QUARTERLY REPORT

OF THE

ATTORNEY GENERAL

OF

ALABAMA

For the Period

April 1, 1950

Through June 30, 1950

Volume 59

TO ALL STATE AND COUNTY OFFICERS OF ALABAMA:

In accordance with Code 1940, Title 55, Section 228, I am submitting to you the Quarterly Report of the Opinions of the Attorney General of Alabama. This Report covers all opinions rendered by the Attorney General from April 1, 1950, through June 30, 1950.

The Section of the Code referred to above requires that seven copies of this Quarterly Report be sent to each of the Probate Judges in the State, and the Probate Judge shall in turn deliver one volume each to the Clerk of the Circuit Court, the Sheriff, the Tax Collector, the Tax Assessor, the County Superintendent of Education, and Deputy or County Solicitor. Said Code Section also requires a copy of said Report be sent each Circuit Solicitor and the chief executive officer of each incorporated municipality in the State.

If you have any suggestions to make regarding the improvement of the service, we should be glad to receive it.

The office of the Attorney General is anxious to render prompt and efficient service to the State and county officials.

Very respectfully,

A. A. CARMICHAEL,

Attorney General.

QUARTERLY REPORT
OF THE
ATTORNEY GENERAL

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OPINIONS

April 5, 1950.

Hon. K. J. Griffith,
Judge of Probate,
Cullman County,
Cullman, Alabama.

Elections — Political Parties — County Democratic Executive Committee.

1. County Democratic Executive Committee has discretion to determine whether name of candidate for beat committeeman shall appear only on ballot going to his respective beat.

2. Primary election laws do not authorize the use of a separate ballot for party committeemen and another separate ballot for all other offices.

3. Judge of Probate not authorized to have blank spaces provided on ballots for write-in votes for beat committeemen.

Opinion by Assistant Attorney General Livingston.

Dear Sir:

Your request for an official opinion bearing date of March 10, 1950, is as follows:

"There has arisen a situation affecting the forthcoming primary election that I need your opinion on.

"On the form sent out by Chairman McCorvey, you will note at the bottom of the form instructions as to who the candidates are to file the affidavit of his declaration of candidacy and also under the corrupt practice act. The beat committeemen of the different beats have filed under this with me their declaration and under the law as I understand, their names are supposed to be placed on the ballots. This, of course, brings up some important questions. First, would the name of the beat committeemen filing be placed on the ballot going to his respective beat or would his name be placed along with all the other names of the beat committeemen filing? Second, would the publisher be authorized under the law to make a separate ballot, one ballot to carry the names of all the candidates running for public office and another ballot with the names of all the candidates running for strictly party offices?

"As to the second part of the second question, it would be less confusing to the voters to have the ballot prepared in this manner.

"Third. Whatever your answer to the above questions will be, could there be blank spaces left to write in the names of the beat

committeemen where the members of the Democratic party could write in their choice if they did not see fit to vote for the candidates for beat committeemen whose name appeared upon the ballot.

"I will appreciate an answer to this inquiry at the earliest convenient moment."

Reference is made to Title 17, Section 341, Code of Alabama 1940, which provides:

"There may be provided a committee of each party for the state and each political subdivision of the state, including counties and municipalities, said committees to be selected in such manner as may be provided for by the governing authority of each party, but if there shall not be elected or chosen any committee for any county or municipality, then all the powers which could be exercised by any such committee shall be vested in the state executive committee, under such rules and regulations as the governing authorities of the party may designate; provided, however, that should no committee be elected or chosen from any municipality in the state, then the executive committee of the county in which said municipality is located shall exercise the powers and perform the duties of the executive committee of such municipality. The state executive committee may provide for the selection of any such committee."

1. In substance, this section merely makes permissive the existence of county and municipal political party committees, with alternate provisions in the event no such committees are established. It is, of course, apparent from your inquiry that such a county committee has been established in accordance with Section 341, supra, for Cullman County.

Section 342, supra, is as follows:

"The county executive committee of any political party of any county in this state may, by a majority vote of said committee, require that members of said committee be elected by the qualified electors of such political party. When such committee adopts a resolution requiring that such members be so elected, candidates for membership on said committee shall file their declaration of candidacy as other state and county officers in the primary election to be held by such political party."

This provision is pertinent in answering your first inquiry, for it is the only statute which provides for the election of county committees. The statute itself confers a large degree of discretion upon the County Executive Committee in that it may require members of the county committee to be elected. The statute contemplates more than one method of selecting members of the county committee. This statute is silent as to the mode or manner in which the county committee is to be elected, with the sole exception that "members of said committee be elected by the qualified electors of such political party." Again, it is apparent from your request,

and it is assumed in answering your first inquiry, that the County Executive Committee has, in accordance with Section 342, supra, adopted a resolution requiring members of the county committee to be elected by the qualified electors of such political party. To comply with Section 342, supra, candidates for county committeemen must file their declaration of candidacy as other state and county officers in the primary election. It is then the duty of the chairman of the County Executive Committee to certify the names of all candidates for nomination to county offices to the probate judge not less than forty days prior to the date of election. Act No. 601, General Acts 1947, page 444; Title 17, Section 412, Code of Alabama 1940. Then, "The probate judge of each county shall have the ballots prepared for the primary election." Act No. 601, supra.

There is contained in the primary election laws no provision which would prohibit the printing of the names of all candidates for beat committeemen on the same ballot; likewise, there is nothing prohibiting the name of a candidate for beat committeeman from appearing only on the ballot going to his respective beat. I am of the opinion, therefore, that the County Executive Committee is vested with the discretion to determine whether the name of a beat committeeman shall appear only on the ballot going to his respective beat, or whether the names of all candidates for beat committeemen shall appear on the same ballot. Your first inquiry, therefore, addresses itself, not to this office, but to the County Democratic Executive Committee.

2. There is no provision of law which would authorize the use of a separate ballot for candidates for committeemen and a separate ballot for candidates for all other offices. Throughout Title 17, Section 336, et seq. Code of Alabama 1940, reference is made to the use of a single ballot which shall bear the names of all opposed candidates seeking office in the primary election. Section 350, supra, provides that the primary ballot shall be captioned:

"OFFICIAL PRIMARY ELECTION BALLOT."

Furthermore, Section 352, supra, absolutely prohibits the use of such two separate ballots wherein it provides the form of the official ballot. It would, in my opinion, be contrary to the primary election laws to use two ballots, one for candidates for committeemen and one for candidates for all other offices.

In this connection your attention is called to an opinion released to the Honorable G. C. Brittain, Judge of Probate, Calhoun County, dated April 3, 1950, which held that the names of unopposed candidates for County Democratic Executive Committee should not, by virtue of Act. No. 601, General Acts 1947, page 444, be printed on the ballots to be used in the primary election.

3. As to your third inquiry, you are advised that there can be no write-in votes in a primary election. Biennial Report of Attorney General,

1930-32, page 808. Section 342, supra, specifically provides that in the event the County Executive Committee requires county committeemen to be elected, **"candidates for membership on said committee shall file their declaration of candidacy as other state and county officers in the primary election to be held by such political party."** (Emphasis supplied.)

You are not, therefore, authorized by law to have blank spaces provided on the ballots for write-in votes for beat committeemen.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 6, 1950.

Hon. E. S. Morgan, Director,
State Docks and Terminals,
Mobile, Alabama.

Docks—Commissions—Labor—Contracts.

Under Title 38, Section 17, Code of Alabama 1940, the Director of the State Docks and Terminals has authority to enter into working agreements as to wages, seniority and working contions with nonoperating railway employees.

Opinion by Assistant Attorney General Parker.

Dear Sir:

Your request for an official opinion, bearing date of March 17, 1950, is as follows:

"Please give me your official opinion on the following question. Title 38, Section 17, Code 1940 for Alabama provides in part as follows:

" 'And the state, acting through the said department, shall have the right and authority to make agreements as to scale of wages, seniority and working conditions with locomotive engineers, locomotive firemen, switchmen and switch engine foremen and hostler engaged in the operation of the terminal railroads provided for in this section, **and the service and equipment pertinent thereto.** And should the said department exercise the authority herein given then in such event it shall be the duty of the said department to make such agreement with said employees herein-above sepcified, in accordance with the act of congress known as the Railway Labor Act (U. S. C. title 45, sections 151-163) as amended or as hereafter amended to the end that the same agreements as to seniority and working conditions

will obtain as to said employees and the standard rate of pay be provided, as are in force relative to like employees of interstate railroads operating in the same territory with terminal railroads authorized hereby.'

"Under the above provision of Law:

"Please advise me if the State Docks Director with the approval of the Governor has the authority to enter into a working agreement as to scale or wages, seniority and working conditions with non-operating railway employees, which includes shop-men, track-men, and others employed by the Docks Terminal Railway Division.

"I shall appreciate your official opinion at your earliest convenience, in view of the importance of the matter."

A careful review of the Alabama statutes pertaining to the personnel operating the terminal railroads under the Department of State Docks and Terminals, convinces me that it was the intention of the Legislature to authorize the Department of State Docks to deal with all of the employees (operating and nonoperating) of its terminal railway facilities in accord with the Federal Railway Labor Act (U. S. C. Title 45, Sections 151-163, as amended).

Familiar canons of construction require that a statute be construed in harmony with statutes existing at the time of its enactment, **Gulf States Steel Company v. Justice**, 204 Ala. 577, 87 So. 211, and the Legislature is presumed to know the construction placed on a statute of another sovereign when it refers to it. **Loveman, Joseph and Loeb v. McQueen**, 203 Ala. 280, 82 So. 530.

At the time of the passage of Section 17, supra, (September 9, 1935) the decisions of the United States Supreme Court had clearly established that terminal railroad installations such as here in question were engaged in interstate commerce, and, therefore, subject to the control of Congress through the Interstate Commerce Commission and the Railway Labor Act. **Cinn. N. O. and T. F. R. Co. v. Interstate Commerce Commission,** 162 U. S. 184 (1896); **Interstate Commerce Commission v. Detroit G. H. & M. R. Co.**, 167 U. S. 633 (1897), 42 L. Ed. 306. **U. S. v. Brooklyn Eastern District Terminal** 249 U. S. 296 (1918), 63 L. Ed. 613, 39 S. Ct. 283, **Chicago and E. I. Railrway Co. v. Chicago Heights Terminal Transfer R. Co.**, 147 N. E. 666, 317 111. 65, writ of error dismissed (1926), 46 S. Ct. 207, 270 U. S. 626, 70 L. Ed. 767; **Ill. Central R. Co. v. DeFuntes** (1915), 236 U. S. 157, 35 S. Ct. 275, 59 L. Ed. 517. See also the later case of **U. S. of America v. State of California**, 297 U. S. 175 (1936), 80 L. Ed. 567.

Subsequent interpretations of the U. S. Supreme Court clearly included such non-operating employees within the coverage of the National Railway Labor Act. **Virginian Railway Co. v. System Federation No. 40 (A. F. of L.)**, 300 U. S. 515 (1937), 81 L. Ed. 789. The number of such

employees having increased over the years, the question is now presented as to your authority under Section 17 to enter into agreements with them.

Ordinarily, the enumeration of certain specified classifications of employees might be construed to exclude others. However, such construction applied to Section 17, supra, leaves the phrase "and the service and equipment pertinent thereto" meaningless and would entirely disregard the coverage of the National Railway Labor Act. In view of the express purpose of Section 17, supra, "that the same agreements as to seniority and working conditions will obtain as to said employees and the standard rate of pay be provided, as are in force relative to like employees of interstate railroads operating in the same territory * * *," it is my opinion that Section 17, supra, authorizes you to make agreements with the nonoperating employees in accord with the provisions of the National Railway Labor Act and that the phrase "and the service and equipment pertinent thereto" has reference to such nonoperating employees.

This construction is strengthened by the provision of the Merit System Act (Title 55, Section 301, Code of Alabama 1940, as amended by Act No. 349, General Acts of Alabama 1943, page 332, approved June 30, 1943), which reads, in pertinent part, as follows:

> "The exempt service shall include: * * * The employees of the state docks commission engaged in railroad service and subject to the provisions of an act of congress known as the railway labor act as amended or as it may hereafter be amended. The service here listed as exempt shall in no respect be subject to the provisions of this chapter, anything to the contrary notwithstanding. * * * *"

As I have shown, supra, the nonoperating employees of the Docks and Terminal Railway Division are subject to the provisions of the Railway Labor Act. They are, therefore, excluded from the coverage of the Merit System Act by Section 301, supra. It follows as a logical conclusion that they were excluded under Section 301, supra, because they had been previously covered under Section 17, supra.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

April 6, 1950.

Hon. Joe Foster,
Tax Collector,
Colbert County,
Tuscumbia, Alabama.

Ad Valorem Taxes—Lien.

Under Title 51, Section 884, Code of Alabama 1940, the lien attaches on all property of the taxpayer, real and personal, for taxes due on any of his property. Sale of real property, and payment of the taxes thereon, does not relieve such property from being subject to the levy for taxes on personal property due by taxpayer.

Opinion by Assistant Attorney General Burton.

Dear Sir:

Your request for an official opinion, bearing date of March 21, 1950, is as follows:

"I should like for you to give me a ruling on the following tax problem:

"The Home Siding and Roofing Company, by its agent, Mr. J. W. Davenport, signed the 1949 assessment sheet, listing a real estate value of $370.00 and personal property at a value of $2875.00. Before the beginning of the taxpaying period, October 1, 1949, the company had gone out of business; the First Federal Savings and Loan Association of Florence had foreclosed on the lot and building on which they held a mortgage, and the personal property had been disposed of, and beyond the reach of the Collector.

"The First Federal Savings and Loan Association insisted upon paying the tax on the lot and building on which they held a mortgage This left only the tax on the personal property, which the mortgage did not cover, and although I have made many efforts to collect this from Mr. Davenport, I have failed so far to do so as Mr. Davenport is apparently insolvent.

"I shall appreciate your giving me a ruling at once as to whether or not I can take credit for this as an Insolvency."

In answer to your inquiry, I wish to state that I am of the opinion that you cannot lawfully take credit for the tax due on the personal property listed by the Home Siding and Roofing Company for the tax year 1949, as an "insolvency" or to include the taxpayer's name on the insolvent list. On the other hand, you should proceed to levy upon and sell the real estate which was also listed by the taxpayer for said tax year in

order to satisfy the taxes due on the persopal property, regardless of the fact that the First Federal Savings and Loan Association has foreclosed its mortgage on this real estate, and has paid the 1949 taxes on said realty.

Title 51, Section 884, Code of Alabama 1940, provides as follows:

> "From and after the first day of October of each year, when property becomes assessable the state shall have a lien upon each and every piece or parcel of property owned by any taxpayer for the payment of all taxes which may be assessed against him and upon each piece and parcel of property real or personal assessed to owner unknown which lien shall continue until such taxes are paid, and the county shall have a lien thereon for the payment of the taxes which may be assessed by it; and if such property is within the limits of a municipal corporation such municipal corporation shall have a like lien for the payment of the taxes which may be assessed by it. These liens shall be superior to all other liens and shall exist in the order named and each of such liens may be enforced and foreclosed by sale for taxes as provided in this title, or as other liens upon property are enforced, except as otherwise provided by law."

Thus, in accordance with said Code Section, a general lien attached on October 1, 1948, for the 1949 tax year, on all of the property of the taxpayer, both real and personal, for taxes due on any of his property. The payment of taxes on separately assessed property does not relieve such property from the lien or from being subject to levy for any other property taxes due by the taxpayer. Quarterly Report of Attorney General, Vol. 14, page 133, and Biennial Report of Attorney General, 1934-36, page 641. Also see Title 51, Section 208, Code of Alabama 1940. It makes no difference that the mortgage on the real estate was foreclosed prior to the date for the payment of said taxes, namely, October 1, 1949, for the lien for said taxes by law attached for the tax year 1949 on October 1, 1948. **United States v. State of Alabama**, 313 U. S. 274, 61 S. Ct. 1011, 85 L. Ed. 1327.

While under Title 51, Section 199, Code of Alabama 1940, mortgagees, purchasers, or lienholders may pay on real estate without paying on the personal property under certain circumstances, **that can be lawfully done only when the person subject to such taxes has sufficient other real or personal property returned and assessed and subject to levy and sale out of which the remainder of the taxes can be collected.**

Under the facts as submitted by you, the taxpayer has dissipated all of his personal property and is insolvent, and thus has no property other than the real estate covered by the moregage in favor of the First Federal Savings and Loan Association, out of which the tax on the personal property can be collected. It is, therefore, your duty under the law to collect the tax on the personal property out of said real estate.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 6, 1950.

Hon. J. N. Pollard, Register,
Circuit Court,
Crenshaw County,
Luverne, Alabama.

Elections—Absentees Voters.

Under the provisions of Act No. 424, General Acts 1949, page 601, the ballots cast by absentee voters are to be delivered by the Register to the proper election officials upon the day of the election at a time prior to the closing of the polls.

Opion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of March 3, 1950, is as follows:

"Would thank you for an opinion on the following: If an absentee ballot is cast by a duly qualified voter in the Armed Forces of the United States, what time is it due to be delivered to the Election Officers of the precinct or ward of which he is a duly qualified elector?"

In answer to the above inquiry, I would advise that in only one instance are the ballots cast by absentee voters to be delivered to the election officials of the precincts or wards of which such persons are qualified electors. This single exception is to be found within the provisions of Act No. 424, General Acts 1949, page 601, which Act now governs, in all respects, the casting of Absentee ballots in elections within this State.

Section 12 of such Act provides, in part, as follows:

"* * * As regards cities and towns with populations of less than 10,000 in the case of municipal elections held at a time different from a primary or general election, such ballots shall be delivered to the election officers of the precincts of the respective voters. * * *"

In all other instances absentee ballots are to be delivered, by the Register, to those persons appointed under the provisions of Section 11 of Act No. 424, supra, for the purpose of receiving, counting and returning those ballots cast by absent voters.

Regarding the time at which the delivery of such ballots should be made to the proper election officials, I would advise that, in either event, the time of such delivery is governed by that portion of Section 12, supra,

which provides that such delivery be made "On the morning of the day of the election, not later than the time set for closing of the polls. * * *"

Although this particular provision does not state with specific certainty the hour of the delivery of such ballots, it does make mandatory the provision that such ballots be delivered to the proper election officials upon the day of the election, at a time prior to the closing of the polls.

I, therefore, advise you that, as Register, you should deliver those ballots cast by absent voters to the proper election officials upon the day of the election, and that you must deliver such ballots prior to the closing of the polls upon that day.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 10, 1950.

Hon. S. R. Rollins,
Clerk, City of Atmore,
Escambia County,
Atmore, Alabama.

Intoxicating Liquors—Alabama Alcoholic Beverage Control Board-Act—Municipalities.

1. Advertising of cereal beverages (beer) by billboards is legal.

2. Advertising of intoxicating beverages, other than beer, by billboards is prohibited.

3. Municipality has no authority by ordinance to regulate the above, contrary to State law.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of January 27, 1950, is as follows:

"The Mayor requests me to ask your opinion as to the legality of Outdoor Poster and Bill Board advertising of Cereal Beverages (Beer), or other intoxicating beverages in incorporated towns and cities and the statute covering.

"Also, if not covered by statute, has the City authority by ordinance to regulate the above?"

Title 29, Section 12, Code of Alabama 1940, states:

"There shall be no electric signs, painted signs, or signs of any kind, displayed outside any place of business advertising alcoholic beverages as enumerated and defined in this chapter; and there shall be no advertising of alcoholic beverages as enumerated and defined in this chapter, except through newspapers, magazines and radio broadcasting stations, provided, however, that malt or brewed beverages as herein defined may be advertised by means of billboards."

This statute limits the advertising of all intoxicating beverages to advertising through newspapers, magazines, and radio broadcasting stations, with the one exception that malt or brewed beverages may also be advertised by billboards. Therefore, it is my opinion that the advertising of cereal beverages (beer) by billboards is legal, but that the advertising of intoxicating beverages, other than beer, by billboards is illegal.

Section 89 of the Constitution of Alabama 1901 states:

"The legislature shall not have power to authorize any municipal corporation to pass any laws inconsistent with the general laws of this state."

It follows that since the Legislature has set forth in Title 29, Section 12, supra, the law as to the advertising of all intoxicating beverages, it is my opinion that a municipality has no authority to regulate by ordinance said advertising contrary to the State law. Quarterly Report of Attorney General, Vol. 7, p. 171.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 10, 1950.

Hon. M. W. Forman,
Judge of Probate,
St. Clair County,
Ashville, Alabama.

Registers—St. Clair County—Elections—Absentee Ballots.

1. Under the provisions of Title 13, Section 210, Code of Alabama 1940, the presiding judge of the Sixteenth Judicial Circuit has authority to appoint a register for the Southern Judicial Division of St. Clair County, and a register for the Northern Judicial Division of St. Clair County.

2. Said registers, in their respective judicial divisions, have authority to discharge any duty imposed by law on the registers

of the circuit courts of the State, and are entitled to the fees and compensation provided by law for the performance of such duties.

3. St. Clair County must pay the register of the Northern Judicial Division of said county the compensation provided for in Section 17 of Act. No. 424, General Acts 1949, page 601, and must also pay the register of the Southern Judicial Division of said county the compensation provided in Section 17, supra.

Opion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of January 20, 1950, is as follows:

"St. Clair County has two Registers of the Circuit Court in Equity, having two courthouses. There is one in Pell City who is also the Circuit Clerk of the Southern Judicial Division of St. Clair County. The Circuit Clerk's assistant of the Northern Judicial Division is also Register of the Circuit Court in Equity for the Northern Judicial Division.

"Under the new absentee ballot law, each one of these Registers have turned in a claim against the County for $210.00 each for handling the absentee ballots.

"Will you please advise if the County can pay two Registers in the County the full amount for handling absentee ballots. In other words, this will be the County paying the Registers for handling absentee ballots $420.00."

St. Clair County was divided into two judicial divisions by Act No. 53, Local Acts 1907, page 61. Section 2 of this Act provides that "Precincts Nos. 1, 2, 3, 4, 5, 6, 7, 8, and 18 and 22 shall constitute and be known as the northern judicial division; and precincts Nos. 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 20 and 21 shall constitute and be known as the southern judicial division; * *" Precinct No. 9 was detached from the Southern Judicial Division and attached to the Northern Judicial Division by Act No. 385, Local Acts 1907, page 505. Said Precinct No. 9 was detached from the Northern Judicial Division and attached to the Southern Judicial Division by Act No. 328, Local Acts 1923, page 225. However, said Act provided for an election by the qualified electors of said precinct to determine whether or not said Act would go into effect. I do not know the result of this election, but the outcome has no bearing on the question under consideration.

In considering Act No. 53, supra, the court, in the case of **Shell v. The State,** 2 Ala. App. 207, 56 So. 39, stated as follows:

"It is evident that in adopting the above act, the Legislature intended that the circuit court, when held at Pell City—a place where it could not be held, unless expressly so provided by law—should be as distinct from the same court when held at the county seat as if the Southern division of the county, was in fact, a separate county. When the circuit court sits in the Northern division of the county, it has no jurisdiction over causes of action triable in the Southern division, and vice versa; and for all practical purposes the two courts are as distinct as if they existed under two independent legislative acts. In legal contemplation, both courts are but the circuit court of the county but for all practical purposes of administering justice they are as distinct from each other as are the circuit courts of two different counties."

In the case of **Speer v. State**, 27 Ala. App. 579, 177 So. 162, cert. den. 235 Ala. 46, 177 So. 167, in considering various acts dealing with the division of St. Clair County into two judicial divisions, the court said:

"In this connection, it is known to us and, of course, to the legislative body, that a range of mountains, known as Backbone Mountain, divides the county almost equally, and that these mountains have been, at all times, very sparsely settled, and, therefore, it may be assumed that the Legislature had in mind the enactment of legislation fixing the sites of two courts, and defining the jurisdictions thereof, so as to meet the convenience of the people residing in the territory of the county.

"The Constitutional Convention of 1901 (Journal of Conventions of 1903, p. 1381) by Ordinance No. 390 took cognizance of the situation in St. Clair county, and growing out of that ordinance subsequent Legislatures have undertaken to effect the relief desired for the convenience of the inhabitants of the territory.

* * * * *

"We are clear to the conclusion that all of these various acts still remaining as valid laws had the effect of dividing St. Clair county into two judicial divisions as completely as if they were in separate counties, except for the one fact, for the convenience of the proper officials, all of the juries to be used in the trial of cases or in attendance upon the court would be drawn from one jury box. * * * * *

* * * * *

"All of our decisions, as far as we are able to find, proceed upon the theory that the effect of acts dividing counties into jurisdictions wherein circuit courts are required to hold sessions and in confining the jurisdiction of causes by territorial limitations is, in effect, setting up separate jurisdictions within the same counties as effectually as if two counties had been made instead of one. Lowery v. State, 103 Ala. 50, 15 So. 641; Evans v. State, 201 Ala. 693, 79 So. 240; Kuykendall

v. State, 16 Ala. App. 197, 76 So. 487; Harris v. State, 16 Ala. App. 509, 79 So. 270; Hardeman v. State, 19 Ala. App. 563, 99 So. 53; Porter v. State, 20 Ala. App. 74, 101 So. 97."

Title 13, Section 210, Code of Alabama 1940, provides in part as follows:

"There shall be a register of the circuit court of each county to be appointed as follows: Where there is only one judge of the circuit, the register shall be appointed by such judge; where there are more judges than one, the presiding judge shall appoint the register."

While it is true that Section 210, supra, provides for the appointment of a register of the circuit court of each county, and while there is only one circuit court of St. Clair County, inasmuch as the authorities above treat the two judicial divisions "as distinct from each other as are the circuit courts of two different counties," it is my conclusion (1) that under the provisions of Section 210, supra, the presiding judge of the Sixteenth Judicial Circuit has authority to appoint a register for the Southern Judicial Division of St. Clair County, and a register for the Northern Judicial Division of St. Clair County; and (2) that said registers, in their respective judicial divisions, have authority to discharge any duty imposed by law on the registers of the circuit courts of the State, and are entitled to the fees and compensation provided by law for the performance of such duties.

Specifically answering your inquiries, it is my opinion that St. Clair County must pay the register of the Northern Judicial Division of said county the compensation provided for in Section 17 of Act. No. 424, General Acts 1949, page 601, and must also pay the register of the Southern Judicial Division of said county the compensation provided for in Section 17, supra. In other words, each register is entitled to the full compensation provided in said Section 17, supra.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 10, 1950.

Hon. Coma Garrett, Jr.
Judge of Probate,
Clarke County,
Grove Hill, Alabama.

Plumbers—Licenses—Words and Phrases.

For a plumber to be "duly licensed" within the meaning of Section 7 of Act No. 529, General Acts of Alabama 1949, page 827, he must have secured a license under Title 51, Section 574, Code of Alabama 1940, and if he does business within an incorporated

municipality in Jefferson, Mobile and Montgomery Counties, he must in addition have taken out the license required by Title 62, Section 123, Code of Alabama 1940.

Opinion by Assistant Attorney General Parker.

Dear Sir:

Your request for an official opinion, bearing date of February 9, 1950, is as follows:

"Section 7 of Act No. 529, General Acts 1949, page 827, which, among other things creates the Board of Plumbers Examination and Registration of Alabama, reads, in pertinent part, as follows:

"* * * * The examination required of an applicant for a permit as a master plumber or journeyman plumber may be waived by the Board as to any person who furnishes satisfactory proof to the Board that he is a person of good moral character, and that he has been actively engaged as a master plumber or as a journeyman plumber, **and duly licensed as such under the general laws of the State of Alabama**, as the case may be, **for at least two years**, provided that such person files an application in writing for waiver with the Board, which application shall be accompanied by an affidavit giving the name or names of persons, firms or corporations, and the addresses thereof, by whom he has been employed, or for whom he has done plumbing work, during said two years of his engaging in said trade. And, provided, further, that said application be filed within six months after the passage of this Act. * * *" (Emphasis supplied.)

"Please advise me whether or not the Board has the authority to waive the examination required of an applicant for a permit as a master plumber, upon receipt of a written application for such waiver, from a person who meets all of the requirements for waiver, and who for many years has paid the license on plumbers levied by Title 51, Section 574, Code of Alabama 1940, but who never received a license or certificate as a master plumber from the predecessor to the present Board of Plumbers Examination and Registration of Alabama, under the laws which applied to it.

"Stated differently, does the language 'duly licensed as such under the general laws of the State of Alabama * * * for at least two years' in the above quoted excerpt from Section 7 of said act refer to a license or certificate issued by the predecessor board under the laws which applied to it, or does it refer to the license on plumbers levied by Title 51, Section 574, Code of Alabama 1940?

"Inasmuch as applications for waiver, as I understand it, must be filed with the Board on or before March 2, 1950, I will greatly appreciate it if you can edvise me in regard to this matter before that date."

The answer to your question depends on the meaning of the phrase "duly licensed as such" in Section 7, supra. The word "such" clearly refers to the words immediately preceding, namely, "master plumber" and "journeyman plumber." Therefore, it becomes necessary to determine what was required of a master or journeyman plumber in order that he be "duly licensed" under the general laws of the State of Alabama within the meaning of Act No. 529, supra.

In the two years immediately preceding the passage of Act No. 529, supra, I find licenses required of plumbers by the provision of the following laws: Title 51, Section 574 (Vocational License Tax) and by Title 62, Section 123 (License required by the Board of Plumbers Examination and Registration of Alabama).

The application of Title 51, Section 574, supra, is by its very terms state-wide. This license is required of every person regardless of his employer-employee status who is doing business as a plumber. Quarterly Report of Attorney General, Volume 51, page 145.

Title 62, Section 123, applies only to Jefferson, Mobile and Montgomery Counties (Title 62, Section 115, Code of Alabama 1940). The license provided for by Section 123, supra, was only required of those who did business as a journeyman or master plumber within an incorporated town, village or city in those respective counties. Quarterly Report of Attorney General, Valume 24, page 7.

In other words, to be "duly licensed" plumbers doing business within an incorporated town, village or city in Jefferson, Mobile and Montgomery Counties, were required to have both the licenses required by Title 51, Section 145, supra, and the one required by Title 62, Section 123, supra.

While to be "duly licensed" plumbers outside of incorporated towns, villages or cities in Jefferson, Mobile and Montgomery Counties, and all plumbers regardless of whether or not they did business in an incorporated municipality in the other counties of the state, were only required to have the license designated by Title 51, Section 574, supra.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

April 10, 1950.

Hon. H. M. Touart,
Tax Assessor,
Mobile County,
Mobile, Alabama.

Ad Valorem Taxes—Masonic Associations—Mobile County—Tax Assessors—Taxes.

1. The Al Hassan Grotto, Inc., an organization in Mobile County composed of Masons, is not exempt from the payment of ad valorem taxes since this organization's property is not used "exclusively" for charitable purposes or used "for purposes purely charitable."

2. The use to which property is put, and not the character of the organization which owns it, determines the question of tax exemption.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for an official opinion, bearing date of October 6, 1949, is as follows:

"The Al Hassan Grotto, Inc., which is an organization in Mobile County composed of Masons, acquired property described as lots 6 and 7 of Lowell Subdivision, County of Mobile, on November 24, 1948. The said Al Hassan Grotto has used this property which includes a structure located on the grounds for the purpose of holding their meetings, etc.

"I am enclosing herewith a copy of the articles of incorporation of the said Al Hassan Grotto, Inc., as filed for record in the office of the Judge of Probate of this County. For your further information, the Trustees of the above Al Hassan Grotto, Inc., have informed me that the main objective of the organization is to raise funds and to donate the same to a Spastic Fund for the relief of persons suffering from cerebral palsy.

"Under the circumstances as outlined above, please advise me if the above mentioned real property in the County of Mobile, owned by the said Al Hassan Grotto, Inc., is exempt from the payment of advalorem taxes for the 1950 tax year, which began on October 1, 1949."

It is my opinion that the property of the Al Hassan Grotto, Inc., is not exempt from ad valorem taxes. An examination of the articles of incorporation of the said Al Hassan Grotto reveals that it is not a sub-

ordinate lodge of the Grand Lodge of Free and Accepted Masons of the State of Alabama, but is rather a corporation formed for the purpose of operating a nonprofit benevolent society in Mobile County, Alabama. Thus, the property to which you refer was acquired in the name of the said Al Hassan Grotto, rather than in the name of any subordinate lodge of the Grand Lodge. Therefore, the case of **Ware Lodge No. 435, etc. v. Harper,** 236 Ala. 334, 182 So. 59, 63, in which it was held that the property owned by a subordinate lodge of the Grand Lodge was exempt from ad valorem tax, is not applicable, since, from its articles of incorporation, this organization cannot be considered a subordinate lodge. See Quarterly Report of Attorney General, Volume 22, page 248.

Title 51, Section 2, Code of Alabama 1940, allows exemption from ad valorem taxation for real and personal property "used **exclusively** for religious worship, for schools, or for purposes **purely** charitable." (Emphasis added.) The articles of incorporation while indicating that the organization is "a non-profit benevolent society" do not confine its activities to purely charitable purposes. To determine whether or not to tax the property is used "exclusively" for charitable purposes or used "for purposes **purely** charitable."

A leading case on property used for charitable purposes is **People ex rel. Thompson v. Dixon Masonic Bldg. Asso.** (1932), 348 Ill. 593, 181 N. E. 434, which held that "even though a Masonic lodge has public benevolence and charity for its primary purposes, its property is not exempt from taxation unless it is used actually and exclusively for such purposes. The **use to which property is put, and not the character of the organization which owns it, determines the question of tax exemption.**" (Emphasis added.)

Since there is nothing in your letter to indicate that the property of Al Hassan Grotto is used **exclusively** for the purpose of raising funds to be used for the relief of persons suffering from cerebral palsy, it is my opinion that their property may be assessed for advalorem taxes for the 1950 tax year, which began on October 1, 1949.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 10, 1950.

Hon. Thomas A. Peavy,
Judge of Probate,
Escambia County,
Brewton, Alabama.

License—Wholesale Dealers in Lumber and Timber—Pulpwood.

A person engaged in the business of handling and shipping pulpwood is not liable for the wholesale lumber dealer's license

imposed by Title 51, Section 546, Code of Alabama 1940, as amended.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of March 2, 1950, is as follows:

"Please advise me if a man handling and shipping pulpwood is entitled to pay a license under Sec-546 (Sch. 84).

"In my opinion this cannot be classed as timber, in view of the fact it has nothing to do with building and cannot be classed as lumber as it is cut and used wholly as WOOD for pulp.

"For your information, pulpwood is cut in 5 ft., 3 in. lengths and could not be converted into lumber or timber.

"Your opinion will be greatly appreciated."

My answer to your inquiry is in the negative.

Title 51, Section 546, which said section levies the license on those persons engaged in business as wholesale dealers of lumber and timber reads, in pertinent part, as follows:

"Each wholesale dealer, or jobber of lumber and timber and for each wholesale dealer in lumber and timber on commission whether maintaining an established place of business or not, one hundred dollars."

At the outset, it must be conceded that a person handling and shipping pulpwood is in no sense of the word engaging in the business as a wholesale dealer or jobber of lumber.

The question, therefore, resolves itself into whether or not "pulpwood" is embraced and included in the word "timber" as it is used in Section 546, supra.

The word "timber" has been defined as "such stuff as is suitable for building and allied purposes." **Gulf Yellow Pine Lumber Company v. Monk,** 159 Ala. 381, 49 So. 248. It thus appears that under the definition of our Supreme Court, pulpwood is not included within the definition of timber. For certain it is, a piece of pulpwood cut into 5 ft. 3 in. lengths, could not be suitable for use in building and allied purposes. In other words, a piece of wood of this length and size could not be converted into lumber suitable for any purpose.

Aside from the above, I deem it advisable to trace the history of Section 546, supra.

This Section appeared as Schedule 126 of the General Revenue Law of 1919. It appeared without material change as Schedule 84 of the 1935 Revenue Act, and has been brought forward as Section 546 of the present Code without material change insofar as the meaning of the word "timber" is concerned.

I also deem it advisable to trace the history and the development of the pulpwood business in the State of Alabama. It is a matter of common knowledge that in the year 1919, when this section appeared in the General Revenue Laws of the State of Alabama, that pulpwood had no marketable value. Wood which is now used as pulpwood was not salable as timber or lumber in 1919.

It is likewise a matter of common knowledge that the first paper mill in the State of Alabama was built at Tuscaloosa, Alabama, in the summer of 1928. Until this time, woody plants suitable for paper mill or pulp stock had no marketable value. It is significant to note that when the General Revenue Act of Alabama was rewritten in 1935, the Legislature, knowing that pulpwood at that time had a salable value, did not see fit to include within the licensing provisions thereof those persons engaging in the business as dealers or jobbers of "pulpwood." It is likewise significant to note that when the Code of 1940 was enacted, Schedule 84 of the 1935 Revenue Act was brought forward in the Code of 1940 without material change.

The Supreme Court of this State, in the case of **Nettles v. Lichtman,** 152 So. 450, 228 Ala. 52, had occasion to consider a somewhat analagous situation to the one here presented.

In that case, in the year 1919, one Lichtman and wife conveyed to the Black Warrior Lumber Company certain property situated in Hale County. This property was described in the deed as "all the trees and timber now standing, lying or being or which within a period of twenty (20) years from the date of this instrument, may grow upon the following described lands." After this granting clause, a vast acreage of land was thereby conveyed. The Supreme Court in that case, after tracing the history of the development of the paper mill industry in this State, held that, at the time the deed was executed wood suitable for paper mill or pulp stock was not intended to be conveyed by this deed, and specifically held, that the word "timber," as used in that deed, did not convey the trees on the property which was suitable for pulpwood either at the time of the conveyance or within twenty years thereafter. This, for the reason that at the time the deed was executed, pulpwood, as that term is now used, had no marketable or merchantable value as timber.

In light of the decision in the Nettles Case, supra, it is my opinion that the Legislature, when the present Section 546 was enacted as part of the General Revenue Act of 1919, did not intend to include pulpwood within the definition of the word "timber" as used in said act. It is likewise my opinion that in the subsequent years, in the adoption of the 1935

Revenue Act and the enactment of the Code of 1940, the Legislature did not intent to include within the term "timber,"—pulpwood. If the Legislature had intended so to include pulpwood, it would have been very easy for them to have so stated. For certain it is, since the year 1928, pulpwood has had a marketable value as such in the State of Alabama.

You are, therefore, advised that a person engaged in the handling and shipping of pulpwood is not liable for a wholesale dealer's license as a dealer in lumber and timber, as set out in Section 546, supra.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

April 10, 1950.

Hon. John Pritchett,
Member Democratic Executive Committee,
Marshall County,
Guntersville, Alabama.
Marshall County.

Local Acts 1931, page 10, County Superintendent of Education.

1. Act No. 569, General Acts 1943, page 573, does not repeal Local Acts 1931, page 10, having to do with the election of County Superintendent of Education of Marshall County except that the beginning of the term of office of such County Superintendent of Education is July first next following his election, and not the first Monday in July next following his election as provided by the Local Law.

2. Under presented facts, the County Executive Committee of Marshall County may call a special election to nominate a candidate for County Superintendent of Education to be elected in the General Election to be held in November 1950.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of March 25, 1950, is as follows:

"As a Member of the Democratic Executive Committee of Marshall County, Alabama, I am asking your opinion on the following matters:

"The Local Acts of 1931, page 10, provide among other things the following; 'Section 1. That at the general election for the year of 1934 and every four years thereafter there shall be elected a County Superintendent of Education for Marshall County, Alabama, by the qualified voters of the said County who shall hold office for a term of four years from the first Monday in July next succeeding the election and until a successor is elected and qualified.'

"In 1943 the Legislature passed an Act providing as follows: 'Section 1. That in counties in which the county superintendent of education is elected by popular vote, that the successful candidate shall take office on July 1 following the date of his election; provided, however, that this act shall not operate to reduce the term of office of any incumbent of said office at the time of the effective date of this act, nor shall this act operate to reduce the term of office for which any person has been elected county superintendent of education who has not taken office at the time of the effective date of this act; provided further, that in any county in which the county superintendent of education has been elected at the general election **in November 1942, to take office for a four-year term beginning July 1, 1944,** the successful candidate for the office of county superintendent of education in such county at the general election in November 1946 shall hold office for a term of five years beginning with July 1, 1948, and his successor shall be elected for a four-year term at the general election in November in 1952, and thereafter every four years.'

"You will notice I have underscored the words 'In November 1942' and the words 'to take office for a four-year term beginning July 1, 1944.'

"I have made inquiry of a number of lawyers in this county and they tell me that since the Local Act provided that the term would begin 'the first Monday in July' in 1943 instead of 'July 1, 1944' as provided in Section 1 of the General Acts approved July 7th, 1943, that the Local Act in Marshall County is still in full force and effect and that at the General Election in November of this year a superintendent will have to be elected for Marshall County, although he will take office on July 1, 1951, instead of the first Monday in July 1951.

"You will notice Section 2 of this General Act approved July 7th, 1943, reads as follows: 'Section 2. That all laws, general, special and local, in conflict with the provisions of this act be and the same are hereby repealed.' Therefore, Section 2 reading as it does would show that it was not the intention to repeal the Local Law for Marshall County because it is not in conflict with Section 1 of the General Acts approved July 7th, 1943.

"The Democratic Executive Committee of Marshall County has not provided for the nomination by the Democratic Party of Marshall County of a candidate for such office to be voted upon in the Democratic Primary of May 2nd.

"Question: Is the Local Act of 1931, page 10, for Marshall County, above referred to the law fixing the date of the term of office of the Superintendent of Education of Marshall County? To put it another way, will the office of Superintendent of Education of Marshall County, Alabama, expire the first Monday in July, 1951, or will the present term expire July 1, 1953, or July 1, 1951? If it expires July 1, 1951, can the Democratic Executive Committee for Marshall County, again meet under the law and permit candidates to qualify for Superintendent of Education in the Democratic Primary to be held in Marshall County on May 2nd, 1950? If not, can such Committee call a special election for such purpose later since everybody concerned at first took it for granted that this Special Act extended the term of office of Superintendent of Education until the 1st day of July, 1953, and for that reason the Committee made no provision for candidates to run in its Primary being held on May 2nd, 1950?

"This is urgent. Please give me your immediate opinion."

In answer to your first question, you are advised that Local Acts 1931, page 10, is the law governing or fixing the term of office of the County Superintendent of Education of Marshall County.

This Local Law provides that the County Superintendent of Education of Marshall County shall be elected at the general election held in 1934 and every four years thereafter, and shall hold office from the first Monday in July next after his election until his successor is elected and qualified.

Act. No. 569, General Acts 1943, page 573, provides that in all counties in which the county superintendent of education is elected by popular vote, the candidate so elected shall take office on July 1 following the date of his election.

Section 2 of Act No. 569, supra, provides that all Local laws in conflict with the provisions of this act are expressly repealed.

The only conflict existing between the Local Act of 1931, applicable to Marshall County, and Act. No. 569, supra, is that under the terms of the Local Act, the County Superintendent of Education takes office on the first Monday in July next after his election. It, therefore, follows that the provision of the Local Act is in conflict with the General law, and in my opinion, the General law prevails and the term of office of the County Superintendent of Education of Marshall County should begin on the first day of July next after his election rather than on the first Monday in July next after his election.

I deem it advisable to state that the second proviso in Act No. 569 has given me some concern. This part of the act provides as follows:

"* * * provided further, that in any county in which the county superintendent of education has been elected at the general election in November, 1942, to take office for a four-year term beginning July 1, 1944, the successful candidate for the office of county superintendent of education in such county at the general election in November in 1946 shall hold office for a term of five years beginning with July 1, 1948, and his successor shall be elected for a four-year term at the general election in November in 1952, and thereafter every four years."

At first blush, it might appear that the Legislature was attempting to fix the term of office of all superintendents of education who were elected at the general election of November 1942 to begin on July 1, 1944. However, a search of the legislative journals reveals that this is not the case. It appears from Act No. 34, Local Acts of Alabama, Extra Session 1932, page 13, that Clarke County had a situation whereby a County Superintendent of Education would be elected in the general election held in November 1942 and would not take office until the first Monday in July 1944. It appears from the legislative journals that the quoted part of this act was added by amendment in the Senate. The amendment being offered by Senator Bradford, who was the Senator from the senatorial district in which Clarke County is a part.

This leads me to the conclusion that the quoted portion of this act was adopted to take care of the situation in Clarke County, and in Clarke County only and was not an attempt on the part of the Legislature to make the term of office of all superintendents of education in the State of Alabama begin on July 1, 1944. The purpose of the act as a whole was to make the term of office of all county superintendents of education start on July of any given year.

Specifically answering your question No. 1, it is my opinion that under the provisions of Local Acts of 1931, page 10, the proper time to elect a County Superintendent of Education of Marshall County is in the general election to be held in November 1950, whose term of office will begin on July 1, 1951.

You state in your request, that the Democratic Executive Committee of your county was under the impression that the Superintendent of Education of Marshall County should be elected in the general election to be held in November 1952. Laboring under this misapprehension, no provision was made for a candidate to qualify or run in the Democratic primary election to be held on May 2, 1950.

The question now presents itself as to whether or not the County Democratic Executive Committee of your county may call a special primary for the purpose of nominating a Democratic candidate for County Superintendent of Education to be elected in the general election to be held in November 1950.

After a thorough and complete study of the primary laws of the State of Alabama, I am of the opinion that your Democratic Executive Committee may call a special primary for the purpose of nominating candidates for County Superintendent of Education for Marshall County.

I specifically call to your attention the fact that any special primary held for this purpose cannot be held at the expense of Marshall County, and the expenses of such primary election must be paid from funds other than the funds of Marshall County. In other words, this primary cannot be held at public expense.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 10, 1950.

Hon. G. H. Boyd,
Register in Chancery,
Jefferson County,
Birmingham, Alabama.

Elections—Absentee Ballots—Registers.

All registers who are now on a salary basis under the provisions of a local act, or a general act with local application, are entitled, personally, to the compensation provided by Section 17 of Act. No. 424, General Acts 1949, page 601, for their services in handling absentee ballots under the provisions of said act.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for an official opinion bearing date of December 4, 1949, is as follows:

"I would appreciate it very much if you will furnish me with official opinion based on the following:

" 'Whether or not the Register of the Circuit Court in a County where his compensation is fixed by Statute and is not on a fee basis, would be entitled to retain the $200 or $10 per day personally under Act Number 424 above.' "

In answer to your request, you are advised that, in my opinion, all registers who are now on a salary basis under the provisions of a local act, or a general act with local application, are entitled to retain, personally, the compensation provided by Section 17 of Act No. 424, General Acts 1949, page 601, for their services in handling absentee ballots under the provisions of said act.

Act No. 424, supra, sets up an entirely new method of handling absentee ballots and imposes the duty of handling the same on the registers.

Prior to the adoption of said act, the registers had no duties imposed upon them by law having to do with the handling of absentee ballots. It, therefore, follows that the duty imposed upon the registers by said act is an extra, new, and additional duty to be performed by them, for which Section 17 thereof provides additional compensation.

Was it the intention of the Legislature that registers who are on a salary basis, under the provisions of a local act, or a general act with local application, receive this additional compensation? I think so. If the Legislature had not so intended, it would have been a simple matter for it to have said so, but it did **not** say so. Too, Act No. 424, supra, is a later expression of the legislative will than any of the acts, local or general with local application, placing registers on a salary basis. The last expression of legislative will is the law. See cases collated and cited in 18 Alabama Digest, Statutes, Key No. 225.

The question then arises as to whether or not this increase in compensation, during the present term of office, does violence to Section 68 or 281 of the Constitution of Alabama 1901. In my opinion, it does not.

In **Tayloe v. Davis**, 212 Ala. 282, 102 So. 433, it was said that no "sound objection obtains to conferring new duties, with compensation, upon the officer who, by reason of knowledge and experience, is best fitted to the new task." In this case, it was held that, notwithstanding Section 281 of the Constitution, "for new and additional duties an incumbent of a public office may be awarded extra compensation without a violation of Sections * * * 281, forbidding an increase of salary during the term."

It cannot be denied that the registers are, by reason of knowledge and experience, amply fitted for the task of handling absentee ballots. It is, likewise, true that this task is an extra, new, and additional duty placed upon them. It, therefore, follows, as pointed out in the **Davis** case, supra, that for this extra, new and additional duty, the Legislature may award extra compensation to the incumbent registers without doing violence to any section of the Constitution.

While this opinion is applicable to all registers now on a salary basis under the provisions of a local act, or a general act with local application (all of said acts having been passed prior to Act. No. 424, supra), I deem it advisable to point out that it has no application to a register whose salary or compensation is fixed by the Constitution. See opinion of Mrs. Pauline K. Barnes, Register, Dallas County, under date of January 6, 1950 (Ms.).

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 11, 1950.

Hon. Frank A. Reagan,
Judge of Probate,
Etowah County,
Gadsden, Alabama.

Licenses.

1. A license issued to one merchant under the provisions of Title 51, Section 525, Code of Alabama 1940, to sell goods, wares and merchandise in one county cannot be transferred to another merchant in another county and thereby license the second merchant to sell the same goods, wares and merchandise purchased from the first merchant.

2. The second merchant referred to in paragraph one above is liable for both the state and county license required by the provisions of Title 51, Section 525, Code of Alabama 1940.

Opinion by Assistant Attorney General Livingston.

Dear Sir:

Your request for an official opinion, bearing date of February 18, 1950, is as follows:

"Will you please give me a ruling on the following:

"A license has been bought in Jerrerson County under Title 51, Section 525 of the Code of Alabama. The entire stock of goods has not been sold and a merchant in Etowah is considering bringing the remainder to this County to sell. The amount of the license is $100.00 to the State and $50.00 to the County. Will he be required to pay a license in this County since a license for this same stock of goods has been bought in Jefferson County, and if he does have to buy another license, will he have to pay the entire amount or just the County part?

"An early reply will be appreciated."

Title 51, Section 525, Code of Alabama 1940, provides as follows:

§ 525, Fire, closing out, etc., sales.—Each person, other than the original bona fide owners, selling goods, wares or merchandise as an insurance, bankruptcy, mortgage, insolvent, assignee's, executor's, administrator's, receivers', trustee's, removal or closing out sale, or a sale of goods, wares and merchandise damaged by fire, smoke, water, or otherwise, shall pay a license of one hundred dollars. The provisions of this section shall not apply to sheriff, constables, or other public or court officers, or to any other persons acting under the license, discretion or authority of any court, state or federal, selling goods, wares or merchandise in the course of their official duties."

It is apparent that the license levied by the above section is levied on **each person** selling goods, wares or merchandise as specified and is not a levy of a license on the goods, wares or merchandise. The fact that one individual licensed under Section 525, supra, to sell goods, wares or merchandise sells his stock of goods to another individual in another county who in turn sells his goods, wares or merchandise does not relieve the second individual from liability for the license also.

Title 51, Section 840, Code of Alabama 1940, provides as follows:

> "§ 840. License deemed a personal privilege.—(a) Every license shall be held to confer a personal privilege to transact the business, employment or profession which may be the subject of the license and shall not be exercised except by the person, firm, or corporation licensed, unless specifically authorized by law to do so. (b) A business or privilege for which such license is issued is, under actual sale, transferred to a new ownership in which case a transfer of license may be effected by application to the probate judge originally issuring such license and the payment of a fee of fifty cents."

The only provision for a transfer of a license is found in Section 840, supra, but this contemplates an actual sale of the business to a new ownership, which is apparently not the situation presented by your inquiry. Biennial Report of Attorney General, 1936-1938, page 696. "* * * It is fundamental that unless a transfer is permitted by the licensing statute, a license cannot be assigned or transferred. 37 C. J. P. 245 * * *."

It is also apparent from the facts of your inquiry that Title 51, Section 831(a), as amended, Code of Alabama 1940, is not applicable. This section provides as follows:

> § 831. License, procurement of; form of license.—(a) In case it should become necessary to remove any business for which a license is required by this section, from one location to another location in the same county, and such business be continued as the same kind and character and by the same person or firm as that carried on at the former location, another license shall not be required for such business for the same license year."

In view of the provisions of Section 831(a), supra, it is my opinion that if the merchant licensed in Jefferson County moves his stock of goods to Etowah County or any other county in the State and sells same himself, the license purchased in Jefferson County under section 525, supra, is not transferable to his new place of business in Etowah County or any other county where said new place of business is located. Section 831(a), supra, applies only where the business is removed to another location in **the same county.**

In view of the above, it is my opinion that the merchant in Etowah County is liable for both the State and county license in Etowah County

required by Section 525, supra. There is nothing in our law which permits a transfer of this license.

See also Biennial Report of Attorney General, 1934-1936- page 446.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 11, 1950.

Hon. A. R. Meadows,
Superintendent of Education,
State Department of Education,
CAPITOL.

County Board of Education—Clay County.

Act. No. 206, General Acts 1949, page 241, takes the County Board of Education of Clay County out from under the penal provisions of Title 52, Section 242, Code of Alabama 1940, for the scholastic year beginning July 1, 1948 and ending June 30, 1949.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of December 19, 1949, is as follows:

"Act No. 206, approved July 12, 1949, validates the acts of the Clay County Board of Education in the transfer of money to the building fund for schools of Clay County from any other fund or funds under its control during the scholastic year beginning July 1, 1948, and ending June 30, 1949. This act also validates expenditures of such fund so transferred in erecting school buildings to replace school buildings destroyed by tornado or other acts of God. Section 2 of the act states that the penalty provided in Section 242, Title 52, Code of Alabama 1940, shall not apply in the event that such transfer or expenditure of school funds results in a deficit.

"On April 6, 1948, a storm destroyed the gymnasium of the Clay County High School and the Negro school building, both located at Ashland, Alabama. The report of the Examiner of Public Accounts of the examination of the Clay County Board of Education, Clay County, Alabama, for the period October 1, 1948, through June 30, 1949, and filed November 25, 1949, quoted the figures of the county superintendent of education to the effect that the cost of replacing the County High School gymnasium was $20,600 and the cost of replacing the Negro school in question was $9,850, making a total of $30,450. The Clay County Board of Education recovered $7,125 insurance on the

building, leaving the sum of $23,325 to be made up from other sources. The budget deficit of the Clay County Board of Education for the fiscal year ending September 30, 1949, is in excess of $23,325.

"I am requesting your opinion on the following question:

"Does Act No. 206, approved July 12, 1949, exempt Section 242, Title 52, Code of Alabama 1940, from applying to the $23,325 deficit created because of the storm damages during the fiscal year ending September 30, 1949?"

Title 52, Section 242, Code of Alabama 1940, provides that no county or city board of education shall spend or obligate itself to spend more money in any fiscal year than the estimate of income available. Said section provides, in pertinent part, as follows:

"* * * If a county or city board of education in any fiscal year violates the provisions of this section, the state board of education **shall reduce in the succeeding fiscal year the allotment from the minimum program fund to which such county or city board of education is otherwise entitled an amount equal to one-fourth of said deficit. * * *"** (Emphasis supplied.)

Act. No. 206, Acts of Alabama 1949, page 241, seeks to exempt the County Board of Education of Clay County from the penalty provided in Section 242, supra, during the scholastic year beginning July 1, 1948, and ending June 30, 1949. Section 2 of said act is as follows:

"The penalty provided in Title 52, Section 242, Code of Alabama 1940, shall not apply in the event that such transfer or expenditure of school funds results in a deficit."

The validity of this act is sustained by the following cases:

Lovejoy v. Beeson

121 Ala. 605, 25 So. 599

City of Anniston v. Anniston Office Building Co.

227 Ala. 180, 149 So. 93

You are advised, therefore, that Act. No. 206, supra, exempts the County Board of Education of Clay County from the penalty as provided by Section 242, supra, if a deficit resulted during the scholastic year beginning July 1, 1948, and ending June 30, 1949.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 11, 1950.

Hon. I. S. McAdory,
Secretary-Treasurer,
State Board of Veterinary
Medical Examiners,
Auburn, Alabama.

State Board of Veterinary Medical Examiners.

State Board of Veterinary Medical Examiners may employ an attorney to aid in the enforcement of the statutes pertaining to veterinarians.

Opinion by Assistant Attorney General Miller.

Dear Sir:

Your request for an official opinion, bearing date of September 6, 1949, is as follows:

"I shall appreciate it if you will give me your official opinion on a question which I have relative to Title 46, Chapter 15, Sections 312-329, Code of Alabama 1940.

"At the present time, there are, at least, three individuals who are engaged in the practice of veterinary medicine in Alabama and such individuals do not have a license or permit from the State Board of Veterinary Medical Examiners as required by Section 318 of Title 46, Code of Alabama 1940. They are not qualified to practice veterinary medicine under the requirements prescribed by law, and the State Board of Veterinary Medical Examiners is considering bringing an action in the nature of Quo warranto proceedings to prohibit these individuals from practicing veterinary medicine in Alabama.

"I shall appreciate it if you will advise me, as Secretary-Treasurer of the State Board of Veterinary Medical Examiners whether such Board may legally expend its funds for the purpose of employing attorneys to institute the above mentioned proceedings in court to the end that the individuals to whom I refer may be prohibited from engaging in the practice of veterinary medicine in violation of legal requirements."

Answer to your question depends upon whether there is express or implied authority for the expenditure mentioned in your inquiry, and such authority must be found within the provisions of Title 46, Sections 312-329, Code of Alabama 1940, the statute which creates the State Board of Veterinary Medical Examiners and regulates and controls the practice of veterinary medicine in Alabama. See Quarterly Report of Attorney General, Volume 18, page 126; Quarterly Report of Attorney General, Volume 6, page 146; **Bice, County Treas. v. Foshee,** 19 Ala. App. 421, 97 So. 764; **Ensley Motor Co. v. O'Rear,** 196 Ala. 481, 71 So. 704.

Title 46, Sections 316 and 329, Code of Alabama 1940, provide that the funds of the State Board of Veterinary Medical Examiners, which funds are derived from the collection of fees, pursuant to Section 316, supra, **"shall be used to pay the legal expenses of the Board."** In an opinion of this office addressed to Hon. B. P. Singleton, Chief Examiner of Public Accounts, under date of January 29, 1940, appearing in Quarterly Report of Attorney General, Volume 18, page 126, it was held that the State Board of Veterinary Medical Examiners does not have "broad authority to expend its money as its will may direct" but that such funds must be spent for the "business of the Board" and "then must find authority in the **main functions and duties of the Board."**

A review of Title 46, Sections 312-329, supra, discloses that the principal duties and functions of the State Board of Veterinary Medical Examiners are to examine and license those who are qualified to practice veterinary medicine in Alabama, and to prevent unauthorized persons from engaging in the practice of this profession. Your attention is directed to the provisions of Title 46, Section 318 and 320, supra, which read, in pertinent part, as follows:

> "Sec. 318. Who may practice Veterinary medicine.—No person who is not a holder of a license or permit from the state board of veterinary medical examiners and no person who fails to have his license annually renewed shall engage in the practice of veterinary medicine and surgery for hire in the State of Alabama."

> "Sec. 320. Practicing veterinary medicine or surgery without license, penalty for.—* * * **The state board of veterinary medical examiners,** or any legally licensed veterinarian or any citizen of Alabama,, may help the solicitor in prosecuting a person or persons for violating any one or more the provisions of such laws of this state." (Emphasis supplied.)

One of the methods of prohibiting a person from unlawfully practicing a profession is by proceedings or an action in the nature of quo warranto, which is provided for under Title 7, Section 1136, Code of Alabama 1940.

Since it appears that one of the functions of the State Board of Veterinary Medical Examiners is to prevent unauthorized persons from practicing veterinary medicine in Alabama, it is my opinion that such Board may legally expend its funds to employ an attorney to institute quo warranto proceedings against an individual unlawfully engaged in the practice of veterinary medicine.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 11, 1950.

Hon. Thomas W. Jones,
Judge of Probate,
Madison County,
Huntsville, Alabama.

Probate Judge—Voters' List.

The Probate Judge in the publication of the voters' list required to be published under the provisions of Title 17, Section 38, Code of Alabama 1940, is not limited to the amount of one and one-half cents per word for the publication of such list as provided by Title 7, Section 718, Code of Alabama 1940.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of April 4, 1950, is as follows:

"A situation exists in Madison County requiring your official opinion.

"Under the provisions of Title 17, Section 38, Code of Alabama 1940, the Probate Judge is required to publish in some newspaper of general circulation in the county, on or before the 15th day of April of each second year, a list of the qualified electors of his county.

"Title 7, Section 718, provides that no more than one and one-half cents per word for the first insertion, and one cent per word for each subsequent insertion, shall be charged or allowed for the publication of a legal notice or advertisement.

"The newspapers of this county state that they will not publish the voters' list as required by Section 38, supra, at the rate of one and one-half cents per word, as provided in Section 718, supra.

"I request your opinion as to whether or not the Probate Judge, in publishing the list required of him to be published by Section 38, supra, is limited to the amount of one and one-half cents per word for such publication as provided in Section 718, supra.

"If your answer to the above question is that the Probate Judge is not limited to the amount of one and one-half cents per word for publishing said notice, as provided in Section 718, then may the Probate Judge contract with a newspaper to publish said notice at the current commercial rates in effect in this county?"

In answer to your request, you are advised that, in my opinion, the provisions of Title 7, Section 718, Code of Alabama 1940, have no applica-

tion to the publication of the list of registered voters required to be published by the probate judge of the several counties of the State under the provisions of Title 17, Section 38, Code of Alabama 1940. The pertinent part of Section 718, supra, reads as follows:

> "Not more than one and one-half cents per word for the first insertion, and one cent per word for each subsequent insertion of a legal notice or advertisement must be charged or allowed; * * *"

It is to be noted that Section 718, supra, a portion of which is quoted hereinabove, is found in Title 7, Chapter 14, Code of Alabama 1940. Your attention is directed to the fact that this chapter is headed: "Notice and Hours of Sale." It is clear to me from the heading of this chapter that the notice and hours of sale as therein used, refer to legal sales, this for the reason that there is no legal requirement for a private individual to advertise a private sale, unless he wishes to attract a crowd for said sale.

The list required to be published by the probate judge under the provisions of Title 17, Section 38, serves one purpose, and one purpose only. The purpose for publishing this list is to advise electors as to whether or not their names appear on said list. If the name of any voter does not appear on the list so published, then under the provisions of Section 38, supra, he is given a period of ten days in which to call this omission to the attention of the probate judge and have his name placed on the list of registered voters, if he can furnish satisfactory proof to the probate judge that his name should appear thereon.

This list is not a notice of any sale; neither is it a legal notice dealt with under the provisions of Chapter 14, the chapter in which Section 718, supra, is found.

In fact, the list required to be published by Section 38, supra, is not a notice of any kind. On the contrary, it only contains the names of those persons who have been certified to the probate judge by the board of registrars as qualified electors of the several counties of the State.

It is, therefore, my opinion that the provisions of Section 718, supra, only apply to a legal notice or advertisement and have no application whatsoever to the publication of the list of qualified voters as required by Section 38, supra. You are advised that the limitation of one and one-half cents per word for the first insertion and one cent per word for each subsequent insertion for a legal notice or advertisement does not apply to the voters' list required to be published by you.

I know of no provision of law that would prohibit a newspaper from charging its regular commercial rates for publishing such a list of qualified voters, and you may contract with such newspaper at the current commercial rate prevailing in your county for the publication of this list.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 11, 1950.

Hon. Roy E. Blair,
Commissioner of Revenue,
State Department of Revenue,
CAPITOL.

License—Personal Loans.

1. Under Title 51, Section 495(2), Code of Alabama 1940, the license levied as to personal loans includes all individual loans not otherwise specifically provided for in said Code section, whether said loans are secured by a chattel mortage on automobiles or other personal property, or are unsecured.

2. Under Title 51, Section 838, Code of Alabama 1940, a license is required for each business operated, regardless of the fact that each of such businesses are owned by the same person or persons.

3. The fact that a person has purchased a license for making loans on real estate under Title 51, Section 495(3), Code of Alabama 1940, or a license for conducting the business of discounting commercial paper under Subsection (1) of said Code section, would not relieve said person from also being required to purchase a personal loan license under Subsection (2) of the same Code section if he is making personal or individual loans.

Opion by Assistant Attorney General Burton.

Dear Sir:

Your request for an official opinion, bearing date of February 17, 1950, is as follows:

"The question has arisen in our License Division as to whether or not certain individuals and loan companies situated in Phenix City and Opelika, and elsewhere in this State, are making personal loans as is contemplated by Title 51, Section 495(2), Code of Alabama 1940.

"Our examiners have cited certain of these parties for licenses for making personal loans in view of the fact that they have found that they have made a practice of making loans to individuals in these communities and have taken as security for such loan chattel mortgages on automobiles and other personal property. Some of these parties are protesting the payment of the personal loan license in these cases on the grounds that Section 495(2) **supra**, does not contemplate or include as personal loans, loans which are secured by chattel mortgages on automobiles or other personal property.

"In one instance it also appears that these loans are being made by companies having two different trade names and which are located in two different localities but in the same community and county, and owned and operated by the same two individuals. These parties contend that as neither of these loan companies are corporations, that under the circumstances they are due only one personal loan license, if they owe any license at all.

"In view of the fact that these questions appear to call for a construction of Subsection (2) of Section 495, and Sections 838 and 839 of Title 51, Code of Alabama 1940, I request your official opinion as follows:

"1. Does Subsection (2) of Section 495, Code of Alabama 1940, contemplate as personal loans, loans which are secured by chattel mortgage on automobiles or other personal property, so as to require State and county licenses for such?

"2. Under Sections 838 and 839 of Title 51, Code of Alabama 1940, would two separate State and county licenses be due, if the answer to Question No. 1 is in the affirmative, where two companies are operating under two different trade names and in different localities in the same community and county, where they are not corporations but owned and operated by the same two individuals?

"2. Would the fact that a person, firm or corporation, has procured State and county licenses for discounting or buying commercial papers under Subsection (1) of Section 495, and for lending money on mortgages secured by real estate under Subsection (3) of Section 495, excuse said person, firm or corporation from being required to also purchase the personal loan license under Subsection (2) of Section 495, if said person, firm or corporation is engaged in making personal loans as are contemplated by said Subsection (2)?

"Your usual prompt reply in this instance will be appreciated, in view of the fact that proceedings against these parties have been continued pending your reply."

Webster's New International Dictionary, second edition, page 1828, and other recognized dictionaries, in defining the word "personal" states that it pertains to "individual" persons or private concerns, and is synonymous with the word "individual." Thus, it clearly appears that the legislature in enacting Subsection (2) of Section 495, supra, in using the phrase "personal loans" contemplated individual loans, as distinguished from industrial loans or loans on salaries, which activities are subject to the same license, or from making loans on real estate under Subsection (3), or from carrying on the business of discounting commercial paper under Subsection (1), both of which are subject to an entirely different license. The courts have also placed a similar construction on the word "personal". Words and Phrases, Vol. 32, page 263; **Gennung vs. Best,** N. J. 135 A. 514, 516; etc.

It, therefore, follows that the phrase "personal loans" as used in Subsection (2) of Section 495, relates to all individual loans not covered by the specific types of loans which are otherwise described in Subsections 1, 2, or 3 or Section 495, and which I have referred to in the preceding paragraph. I am, consequently, of the opinion that the phrase "personal loans", as so used, includes all of such individual loans, secured or unsecured. Thus, this would include individual loans which are secured by a chattel mortgage on automobiles or other personal property.

Your second question is also answered in the affirmative.

Title 51, Section 838, Code of Alabama 1940, clearly answers this question accordingly. I quote it, as follows:

> "Where any person, firm or corporation is engaged in more than one business which is made by the provisions of law subject to taxation, such incorporated company or person shall pay the tax provided by law on each branch of the business."

From what you state, the persons involved both operate and own two separate places of business under different trade names, in two different and distinct places in the same county, although in both instances they do carry on a personal loan business. This would appear to fit exactly the situation contemplated by the above-quoted Code section, as from what you relate these persons are operating two separate and distinct businesses.

While it is true that under our law a license is a personal privilege, Section 838, supra, requires a license for each business operated, regardless of the fact that each of such businesses are owned by the same person or persons. **Pate v. State,** 243 Ala. 44, 8 So. (2d) 516.

This seems particularly true as Title 51, Section 836, Code of 1940, requires, unless authorized elsewhere or otherwise, that every license granting authority to engage in any business or occupation shall designate the place of such business at some house or definite place. Unless it does so, it is void. Moreover, if the licensee attempts to carry on said business or occupation elsewhere than at the designated place, then he is to be considered as operating without a license unless he is expressly authorized to operate elsewhere or otherwise by law. Subsection (2) of Section 495, supra, the statute levying the license under consideration, contains no such expressed authority, nor is it to be found elsewhere in the Code as relating to this particular license.

The answer to your third question is, no.

This office has very definitely determined that Subsections 1, 2, and 3 of Section 495, supra, are separate and distinct in both their terms and application, and the licenses levied thereunder are entirely unrelated, each standing by itself. Quarterly Report Attorney General, Vol. 30, p. 93 Quarterly Report Attorney General, Vol, 8, p. 115; and Biennial Report Attorney General, 1936-38, p. 365. These opinions are also fully in keeping

with the opinion of the Supreme Court in the case of **Leath v. Wilson,** 238 Ala. 557, 192 So. 417.

Therefore, the fact that the persons to which you refer have procured the state and county license for discounting commercial paper under Subsection (1), and the real estate loan license under Subsection (3), would not excuse them from also being required to purchase the personal loan license under Subsection (2), if said persons are also making personal or individual loans.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 11, 1950.

Hon. Roy E. Blair,
Commissioner of Revenue,
State of Alabama,
CAPITOL.

Furs—Licenses—Opinions Overruled—Warehouses.

1. A building used exclusively for the storage of furs incidental to the sale, cleaning, or renovation of such furs, is not a public warehouse within the provisions of Title 51, Section 616, Code of Alabama 1940.

2. Quarterly Report of Attorney General, Volume 24, page 230, overruled.

Opinion by Assistant Attorney General Straub.

Dear Sir:

Your request for an official opinion, bearing date of March 14, 1950, is as follows:

"In an opinion of your office addressed to the Honorable Hamp Draper, and dated September 22, 1941, reported in Quarterly Report of the Attorney General, Volume 24, page 230, you have held that a person, firm or corporation operating a warehouse for the purpose of storing furs and fur coats for hire was liable for the Warehouse license imposed by Title 51, Section 616, Code of Alabama 1940.

"Since that date, and in 1943, Section 568 of Title 2, Code of 1940, the Section which defines warehouses for the purpose of regulation by the State, has been amended by the addition of a proviso which expressly excepts from its operation and its definition of a public warehouse, 'any building, structure, or protected enclosure, or portion thereof, used exclusively for the checking or storing of

hats, wearing apparel, or baggage, **or exclusively for the storing of furs, when the storage thereof is merely incidental to the business of a dealer therein or to the business of cleaning, or renovating such furs.'**

"As the Warehouse License Section, Title 51, Section 616, does not contain a definition of what constitutes a warehouse for the purpose of that statute, I understand that the definition contained in the Public Warehouse Law, Title 2, Section 568, has been generally followed in determing what is a warehouse for license purposes.

"Now that Section 568 has been amended to exclude from its definition of a public warehouse storers of furs, when the storage thereof is merely incidental to the business of a dealer therein or to the business of cleaning, or renovating such furs, I request your opinion as to whether or not such storers of furs are still to be considered public warehousemen within the meaning of Title 51, Section 616?

"In the event that you decide that said storers of furs do not come within the meaning of warehousemen under Section 616, supra, then it appears that your opinion to which I have referred, should be abrogated at least to the extent of excluding from its operation the fur storers described in the proviso contained in said Section 568, as amended.

"As this question has arisen in several cases where citations have been issued, I should appreciate having your opinion at your earliest convenience in order that these matters may be disposed of at an early date."

Title 51, Section 616, Code of Alabama 1940, provides for the licensing of warehousemen. No definition of what constitutes a public warehouse is found in that section. Title 2, Section 568, Code of Alabama 1940, as amended by Act No. 301, General Acts 1943, page 260, provides for the control of public warehouses and defines the same, expressly excluding from its operation "any building, structure, or protected enclosure, or portion thereof, used . . . exclusively for the storing of furs when the storage thereof is merely incidental to the business of a dealer therein or to the business of cleaning or renovating such furs." Therefore, it is my opinion that a building, structure, or protected enclosure, of any portion thereof, used for the storing of furs incidental to the sale, cleaning or renovating of such furs, is not such a public warehouse as is contemplated by Title 51, Section 616, supra, and it is my further opinion that the owner thereof is not liable for a warehouseman's license.

The opinion found in Quarterly Reports of Attorney General, Volume 24, page 230, was written prior to the 1943 Amendment of Section 568, supra. While the above-cited opinion was a correct statement of the

law when written, it is now inapplicable and is hereby expressly overruled insofar as it conflicts with this opinion.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 11, 1950.

Hon. Wm. W. Hill,
Judge of Probate,
Montgomery County,
Montgomery, Alabama.

Filing Tax—Taxation.

A trust agreement executed in compliance with an order of the Alabama Securities Commission which secures no outstanding debt but was executed as a condition precedent to the settlers right to do business within this State is not subject to the tax as provided by Title 51, Sections 618 and 619, Code of Alabama 1940.

Opinion by Assistant Attorney General Metcalf.

Dear Sir:

Your request for an official opinion, bearing date of January 18, 1950, is as follows:

"We are submitting the attached agreement between Investors Syndicate, State Securities Commission and First National Bank of Montgomery, Alabama, in which the First National Bank acts as trustee for collateral, deposited to protect investors in the stocks of investor syndicate.

"The instrument in our opinion must be construed purely as an agreement, and not a Mortgage. Therefore no Mortgage tax is due, but the amounts involved make it necessary that we have an official opinion before accepting this instrument for record.

"The instrument you will notice is dated December 17th, 1938 and assigns and transfers collateral consisting of Bonds, Mortgages, cash and etc. to the amount of $2,452,272.89.

"We wish official opinion.

"1st. Is this attached instrument a transfer of title, on which a Deed tax should be collected?

2nd. Can this instrument be construed as a Mortgage on which a Mortgage tax should be collected?

"3rd. Is the instrument an agreement. Pure and simple on which no tax should be collected?"

Title 51, Section 619, Code of Alabama 1940, provides, in part, as follows:

"No mortgage, deed of trust, contract of conditional sale, or other instrument of like character which is given to secure the payment of any debt, which conveys any real or personal property situated within this state, or any interest therein, shall be received for record unless the following privilege or license taxes shall have been paid upon such instrument before the same shall be offered for record to-wit: (a) Upon all such instruments which are executed to secure any indebtedness which shall not exceed one hundred dollars, there shall be paid the sum of fifteen cents, and upon all instruments which shall be executed to secure the indebtedness of more than one hundred dollars there shall be paid the sum of fifteen cents for each one hundred dollars of such indebtedness, or fraction thereof, which is secured by said mortgage, deed of trust, contract of conditional sale, or other instrument of like character. . . .

Deeds, bills of sales and other instruments of like character are subject to a privilege or license tax under Title 51, Section 618, supra.

The primary consideration is whether the instrument in question is a deed, mortgage or other like instrument which is subject to the tax imposed by the above statutes.

This instrument, a trust agreement, was executed by the parties in compliance with an order of the Alabama Securities Commission. Its execution was a condition precedent to the Investors Syndicate's acquisition of a right to transact certain business in this state. The sole purpose of this instrument is to deposit within the State of Alabama sufficient assets of the Investors Syndicate to protect Alabama investors who have purchased securities of the Syndicate. In event of insolvency, backruptcy or other contingent defaults as provided within the instrument, the Alabama Securities Commission is authorized to withdraw from the trust corpus sufficient assets to save harmless the Alabama investors. By the provisions of the agreement, the amount of the trust corpus is at all times to equal the Syndicate's prospective liability to Alabama investors. The right of withdrawal in the event such liability decreases is awarded the Syndicate. The Syndicate is further empowered to liberally withdraw and substitute securities or assets comprising the trust corpus.

It is significant to note that no outstanding debt is secured by this instrument.

I am, therefore, of the opinion that the commonly termed "filing tax," as provided by Sections 618 and 619, supra, is not due on the instrument submitted by you.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 13, 1950.

Mrs. Elizabeth Wilbanks, Secretary
Democratic Executive Committee,
Tallapoosa County,
Alexander City, Alabama.

Elections—Election Officials.

There is no authority of law for appointing more election officials to serve in any voting place than provided by law.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of April 8, 1950, is as follows:

"Mr. Ralph W. Craddock, Chairman of the Tallapoosa County Democratic Executive Committee has requested me to write you relative to the authority to appoint more than six election officers per box. There are no voting machines in this county and three boxes have over 700 registered voters each and as the county time is approximately twenty hours it is very difficult to get anyone to serve as election officers in these boxes. The County officials are willing to pay for the services of additional officials if they can legally do so.

"The Tallapoosa County Democratic Executive Committee meets for the naming of election managers and clerks on April 15th and we will very much appreciate this information before that date."

My answer to your inquiry is in the negative.

The statutes in regard to the number and appointment of election officials contained in the Code of Alabama 1940 are plain and unambiguous.

Section 120 of Title 17, Code of Alabama 1940, reads as follows:

"The judge of probate, sheriff and clerk of the circuit court, or a majority of them, acting as an appointing board, must, not more

than twenty nor less than fifteen days before the holding of any election in their county, appoint from the qualified electors of the respective voting places three inspectors and two clerks for each place of voting, and returning officer for each precinct, to act at the place of holding elections in each precinct."

Section 349 of Title 17, Code of Alabama 1940, reads, in pertinent part, as follows:

"Each candidate for nomination may at least twenty-five days before the primary, present to the county executive committee of his party a list of election officers desired by him for any one or more of the districts, wards, or precincts; and his county committee shall, so far as practicable, make up, from the list so presented to it, a list of names of election officers, six in number, for each district, ward or precinct, which it will nominate to the appointing board of the county for appointment as officers to conduct the primary election and the county committee shall present the list so made up by it to the appointing board of the county, which appoints the election officers to conduct elections for state and county officers in November, or at any other lawful time, which appointing board from the list so presented to it by the county committee shall if there be on said list the names of sufficient persons who are legally eligible select and appoint the officers to conduct the primary election, * * *

Section 362 of Title 17, Code of Alabama, reads as follows:

"At the close of the primary election at each polling place, and nowhere else, the inspectors and clerks, shall proceed forthwith without adjournment, in the manner provided by law in the case of general elections, to count the vote."

It appears from the above-quoted sections who shall appoint the election officials, the number thereof, and Section 362, supra, provides who shall count the ballots cast in a primary election.

I do not feel that I can enlarge or improve on the wording of any of the above statutes. They speak for themselves and must be followed.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

April 19, 1950.

Hon. J. Albert Logue,
Judge of Probate,
Houston County,
Dothan, Alabama.

Elections—Election Officials—Appointment.

1. The list of names of persons nominated by a political party for service as election officials must be submitted to the appointing board of the county within the time allowed by law for the appointment of such officials and any list subsequently submitted is not to be considered by the appointing board.

2. It is the duty and responsibility of the party committee so submitting said list of names nominated to deliver same to the appointing board and any discrepancies that might arise between the list approved by the Committee and that actually received by the appointing board is the concern of the Committee alone and does not affect the validity of the appointment of those persons duly and lawfully appointed from the list actually received by the appointing board.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of April 19, 1950, is as follows:

"As Judge of Probate of Houston County, Alabama, and by law a member of the appointing board for election officials for said county, I respectfully request your official opinion as to the following:

"On April 17, 1950, I received, by mail, from the Clerk of the County Democratic Executive Committee of Houston County, a list, signed and attested, of those persons nominated by said Committee to serve as election officials for the Democratic Primary to be held May 2, 1950. This list contained the requisite number of names and, upon examination, all persons therein named were found to be qualified for service as election officials. The appointing board thereupon approved said list and furnished copy thereof to the local newspaper as the officials to serve in the election of May 2. Notice of such appointment has been furnished the sheriff of the county for service upon those persons so appointed, and service has been had upon some of those persons so appointed.

"On April 18, 1950, I was advised by the Chairman and other members of the County Democratic Executive Committee that the list of election officials as approved and published by the appointing board is not in all respects the same as that list nominated by the

Committee. I am further advised that a meeting of the County Democratic Committee has been called for April 19, 1950, presumably for the purpose of submitting a second list of names of persons nominated as election officials for the election of May 2.

"I respectfully request your opinion as to whether or not the appointing board of Houston County may receive this second list of suggested election officials and whether or not it would be the duty of the appointing board to reappoint the election officials of the county in conformity with this second list to be submitted on or after April 19, 1950."

It is provided by Title 17, Section 120, Code of Alabama 1940, that:

"The judge of probate, sheriff and clerk of the circuit court, or a majority of them, acting as an appointing board, must, not more than twenty nor less than fifteen days before the holding of any election in their county, appoint from the qualified electors of the respective voting places three inspectors and two clerks for each place of voting, and returning officer for each precinct, to act at the place of holding elections in each precinct."

Under this statute the appointing board is limited as to the time of appointment. It cannot appoint earlier than twenty nor less than fifteen days prior to the election. In your request for opinion you state that in the instant case the appointment of those election officials to serve in the election of May 2, 1950, was made upon April 17, 1950. This was the latest date upon which such appointments could have been made, under the above statute. No further delay would have been authorized.

It is further provided, in pertinent part, by Title 17, Section 349, Code of Alabama 1940, that:

"Each candidate for nomination may at least twenty-five days before the primary, present to the county executive committee of his party a list of election officers desired by him for any one or more of the districts, wards or precincts; and his county committee shall, so far as practicable, make up, from the list so presented to it, a list of names of election officers, six in number, for each district, ward, or precinct, which it will nominate to the appointing board of the county for appointment as officers to conduct the primary election and the county committee shall present the list so made up by it to the apopinting board of the county, which appoints the election officers to conduct elections for state and county officers in November, or at any other lawful time, which appointing board from the list so presented to it by the county committee shall if there be on said list the names of sufficient persons who are legally eligible select and appoint the officers to conduct the primary election . . ."

This statute is a part of the primary election laws of this state and grants to the candidates for nomination by the various political parties

the privilege of submitting to their county executive committee, at least twenty-five days prior to the election, lists of election officials desired by each of said candidates for service in the forthcoming election. Said statute further provides that, from such lists so submitted, the county committee may compile and nominate to the appointing board a list of names of election officials to serve in the election. In this regard it has been held by this office that if the list of election officials submitted to the appointing board by the county executive committee of the party contains the names of sufficient persons who are legally eligible for appointment, then the appointing board must select and appoint the officers to conduct said election from such lists. Quarterly Report of Attorney General, Volume 18, page 177; Quarterly Report of Attorney General, Volume 51, page 26. If, of course, an insufficient number of names are submitted, or if no lists of names of officials are submitted, then the appointing board must proceed itself to select and appoint the officials for the election.

Construing these two statutes together, as I must in giving answer to your inquiry, it is readily apparent that the time within which such list of proposed elections officials is to be submitted by the county executive committee to the appointing board becomes of importance. The requirement that candidates submit their lists of election officials to the county executive committee of their party at least twenty-five days prior to the election is obviously for the purpose of affording the committee ample time in which to compile said lists and submit the party's list of election officials to the appointing board before the expiration of the time allowed by law for the apointment of the election officials. Biennial Report of Attorney General, 1926-28, page 512.

In the instant case you advise that upon April 17, exactly fifteen days prior to the election of May 2, 1950, the county democratic executive committee submitted to the appointing board a list of names of persons nominated by the party for election service upon May 2, 1950. You further advise that this list contains a sufficient number of names of eligible persons to fill all appointments and further, that upon this same day, exactly fifteen days prior to the May 2nd election, the appointing board did approve and appoint, in toto, the names upon the list so submitted by the committee.

You further advise that it is now alleged by members of the committee that certain discrepancies exist between the list actually approved by the committee and that received by the appointing board from which the appointments were made, and you inquire as to whether or not the committee may submit a second list of names of persons nominated for service as election officials and whether, if such second list be submitted, the appointing board must reappoint, in conformity with this second list, the election officials for the county.

Answer to each of these inquiries, in my opinion, must be in the negative.

The facts, as stated by you in your request, indicate conclusively, that the appointing board has complied in every respect with the statutes governing the appointment of the officials for this election, in that said appointing board appointed, in its entirety, the names upon the list received by it from the committee. If it be that certain discrepancies exist between the list approved by the committee and the list actually rceived by the appointing board, this, in my judgment, can have no effect upon the validity of the appointment of those persons appointed by the board upon April 17, 1950. It matters not how such discrepancies arose if they, in fact, arose prior to receipt of such list by the appointing board. It is the duty and responsibility of the county committee to sumbit the list of persons so nominated to the appointing board and, should it be that through mistake, inadvertance, or other means the list actually received by the appointing board does not reflect in full the desires of the committee in this regard this is a matter which concerns only the committee and cannot effect the validity of the appointment of those persons appointed by the board in strict conformity with the statutes in this regard.

I am likewise of the opinion that the committee may not now submit to the appointing board a second list of officials nominated for election service. The time in which the committee may exercise its privilege in this respect has now expired and officials have duly and lawfully been appointed for the election in question. The committee having heretofore exercised its privilege in this regard within the time prescribed by law, and the appointing board having followed in detail the nominations made by the committee, as shown by the lists received by the board, by appointing each and every one of the persons so nominated as officials for the election, the committee cannot now be permitted to again exercise its privilege after the expiration of the time allowed by law, which time expired upon April 17, 1950.

Assuming the accuracy of the facts as stated by you in your request, I must hold that those persons appointed by the appointing board upon April 17, 1950, are the legally appointed officials for the election of May 2, 1950, and that the appointing board is not authorized to receive a second list of nominations from said committee and to reappoint the election officials of the county in conformity with such second list.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

April 19, 1950.

Hon. Tom C. Garner,
Judge of Probate,
Jefferson County,
Birmingham, Alabama.

Banks and Banking—Filing Tax—Taxation—National Banks.

A Judge of Probate is without authority to accept payment of a mortgage filing tax upon a mortgage offered for record by a National Bank-Mortgagee.

Opinion by Assistant Attorney General Nachman.

Dear Sir:

Your request for an official opinion bearing date of September 8, 1949, is as follows:

"Re: Payment of mortgage recording privilege tax under Section 619 of Title 51, Code of 1940

"The First National Bank of Birmingham filed two mortgages made to it as a mortgagee in my office on September 13, 1948, and said Bank did not pay the recording privilege tax on said mortgages because of its exemption from payment by virtue of being a national banking association.

"Said Bank has now presented said two mortgages to me for refiling, and has at the same time offered to pay the mortgage recording privilege tax thereon. At the time of such presentation I was advised by Liberty National Life Insurance Company and by said Bank that said life insurance company is under contract with said Bank to purchase said mortages, subject only to the condition that said mortgage tax be paid. Said life insurance company advised me that, in the event that I had any hesitation in accepting the payment of said tax, it, as the equitable owner of said mortgages, would be willing to pay said tax.

"At the time of presentation of said mortgages for record, said Bank offered to deliver to me a letter in words and figures as follows:

" 'Birmingham, Alabama
September 8, 1949

" 'Honorable Tom C. Garner,
Judge of Probate,
Jefferson County, Alabama,
Birmingham, Alabama.

" 'Dear sir:

" 'The undersigned, The First National Bank of Birmingham, is the owner and holder of two mortgages given to it by Arlington Park

Apartments, Inc., each securing a principal indebtedness of $183,200. These mortgages are each dated September 13, 1948, and were filed for record in your office on September 13, 1948, and are therein respectively recorded in Volume 4181 at page 48, and in Volume 4181 at page 53.

" 'When these mortgages were filed for record in your office this bank did not pay the recording privilege tax thereon because of its exemption from said tax as a national banking association.'

" 'These mortgages are long term mortgages, payable in monthly installments over a period of some thirty-two years, and, under the rules and regulations applying to National Banks, it is not permissible that this bank hold same as a long term investment. We made the said mortgage loans and disbursed the same as construction loans, but the improvements have been completed and it is now necessary that we dispose of the mortgages.

" 'Liberty National Life Insurance Company has contracted in writing with this bank to purchase said mortgages, but its commitments to purchase said mortgages are conditioned upon the payment of the mortgage recording privilege tax because of the exemption provision contained in Section 619 (f) of Title 51 of the Code of 1940.

" 'It will be readily apparent to you, therefore, that it is a matter of corporate necessity to this bank that it be permitted to pay the mortgage privilege recording tax on said mortgages in order that we may be enabled to sell them.

" 'Accordingly, we tender you herewith the said two mortgages for refiling and rerecordation in your office, together with the filing fee of $12.00 and the sum of $549.60, in payment of the mortgage recording privilege tax on said mortgages, and we request that you stamp these mortgages and the records thereof to show that the said tax has been paid on the two mortgages as refiled and rerecorded in your office.

" 'In consideration of your so doing, that bank agrees that it waives its exemption from said tax, states that it pays the same voluntarily, and hereby agrees that neither it nor its successors or assigns, will ever make any claim or demand of any kind on you, or your successors in office, or on the State of Alabama, or on Jefferson County, for the refund or return of said privilege tax or any part thereof, and will never file suit or take any proceedings of any kind or character for the recovery of same.

" 'Very truly yours,

" 'THE FIRST NATIONAL BANK OF BIRMINGHAM,

" 'By John A. Hand,
Its Vice-President.'

"The said insurance company advises me that, in the event I would prefer to have the tax paid by it, said insurance company will give me a letter of the same import, changed only with respect to names and necessary facts to show its position as equitable assignee of the mortgages.

"Please advise me whether I may legally accept the payment of said proffered tax either from said Bank or from said life insurance company, and if so, please advise me from which of them I may so accept the payment of the tax. If you advise me definitely that I may accept such tax from either institution designated by you in your opinion, please advise me whether I would be under personal liability to such institution from whom I accept the tax, or anyone else, for the refund of said payment or any part thereof."

You should not accept the preferred tax from either the Bank, or the Life Insurance Company "as the equitable owner" of the mortgages involved.

At the outset it is important to cite the opinion in Quarterly Report of the Attorney General, Vol. 54, page 196. This opinion states correctly that a National Bank may not pay a mortgage tax at the time of filing the original mortgage, and thereby secure an ad valorem tax exemption for the mortgage. See: Title 51, Section 619 (f), Code. That opinion held that a bank may not pay a tax which does not exist; and, that a mortgage filing tax does not exist as to National Banks. If a bank purported to pay a mortgage filing tax, it would not be paying a tax "prescribed" within the meaning of Section 619 (f), supra, and hence would not have secured the ad valorem tax exemption set out therein. And **State v. First National Bank of Mobile,** 239 Ala. 492, 496, 196 So. 114, has stated, as to State statutes involving taxation affecting National Banks:

"The statute must be read as a whole in the light of constitutional principles, and also in view of the fact that all the State's power to tax National Banks is permissive, and its statutes must be considered in the light of Federal statutes granting this permission."

Thus, as stated in Vol. 54, page 196, **supra,** no mortgage filing tax exists as against the National Bank; and the Bank cannot pay a sum of money to be considered as a mortgage filing tax.

If, however, the argument prevailed that such a voluntary payment by the bank in question would constitute actual payment of the tax, the answer to your question would be the same. The State has no power to tax National Banks or other Federal instrumentalities except as permitted by Congress. **McCulloch v. Maryland,** 4 Wheat. 316; **Owensboro National Bank v. Owensboro,** 173 U. S. 664. The mortgoge filing tax set forth in Title 51, Section 619, Code of Alabama 1940, is a tax on the privilege of recording a mortgage. **State v. Alabama Fuel and Iron Company,** 188 Ala. 487, 66 So. 169. Congress has given the States no power to impose such a privilege tax on National Banks. **Federal Land Bank v.**

Crosland, 261 U. S. 374; **Pittman v. H. O. L. C.**, 308 U. S. 21. But cf. 12 U. S. C. A., Section 548, containing allowable forms of state taxation against National Banks. The United States Supreme Court set out applicable law in **First National Bank v. Anderson**, 269 U. S. 341, 347:

> "National Banks are not merely private moneyed institutions but agencies of the United States created under its laws to promote its fiscal policies; and hence the banks, their property and their shares cannot be taxed under State authority except as Congress consents and then only in conformity with the restrictions attached to its consent."

Thus, it is clear that states have no power to impose a mortgage filing tax upon a National Bank. Even if the theory of the opinion in Quarterly Report, Vol. 54, **supra**, were questionable, any mortgage filing taxation against the Bank is illegal.

It has been argued that the Bank may voluntarily pay a tax, even though that Bank would ordinarily be immune from the same tax. This is incorrect. Those cases and those statutory provisions cited in such argument deal merely with the ordinary business transactions of a National Bank. See, for example, **First National Bank of Charlotte v. National Exchange Bank**, 92 U. S. 122, 23, L. Ed. 679. We are concerned with more than a business transaction of a National Bank. We are concerned with the whole question of Federal-State relationships and the respective powers of each sovereign to tax the other. Certainly, cases which allow the directors and officers of a National Bank to hold unapproved securities in order to avert financial losses, cannot constitute authority for State taxation of National Banks in a form not authorized by Congress.

Equally inapposite are such cases as **Clement National Bank v. Vermont**, 231 U. S. 120, and **Commissioner v. Woburn National Bank**, 315 Mass. 505, 53 N. E. 2d 554. In the **Clement** case the bank was merely acting as a collector for taxes to be paid by the depositors on interest bearing deposits; and the bank was to deduct such payments from the interest or deposits of the persons from whom the taxes became due. Hence, the incidence of the tax fell upon the depositors. The fact that fluctuations in deposits might cause an inexact correspondence between the amount upon which the depositors would have been taxed and the average amount upon which the bank agreed to pay was held to be an insufficient ground for invalidity, since in the ordinary course of business there would be a substantial equivalence. Thus, in the **Clement** case the Bank was not really taxed at all.

The **Woburn National Bank** case, **supra**, is also distinguishable from the instant situation. States were permitted by Congress to tax the net income of National Banks (12 U. S. C. A. 548). Massachusetts had imposed a tax on net income of National Banks. Massachusetts had also provided for an alternative measure of this net income tax, and had allowed the bank to elect either method. **Woburn** held that the bank

could elect an alternative method not specifically allowed by Congress, since the alternative method was in lieu of a permissible method of State taxation. No such situation exists here. The National Bank in question would not have elected to pay a mortgage filing tax in lieu of a permissible tax of substantial equivalence. The National Bank would merely have paid a mortgage filing tax, and would not have escaped a substantially similar and allowable tax thereby.

It is clear from the foregoing discussion that no mortgage filing tax has been imposed against a National Bank, and that a State is without power to impose such a tax upon a National Bank. The underlying rationale involves vital questions of Federal-State relationships. See: **McCulloch v. Maryland, supra.** Such questions must be decided by the sovereigns. Indeed, it is doubtful that you would be completely protected by accepting the purported voluntary waiver of immunity by the Bank in question. **Gully v. First National Bank,** 81 F. 2d 502 (reversed, 299 U. S. 109, on a jurisdictional point) is noteworthy. This case held that the receiver of an **insolvent** bank was not bound by a voluntary payment of an illegal tax by the bank. The Court stated (page 506):

> "But it is argued (by the Tax Collector) (that) here the attack (by the successor receiver) is collateral and the assessment followed a voluntary return by the bank and has been acquiesced in until after the bank's failure, which should estop the bank to question it. **Whether a solvent bank may thus bind itself, we do not inquire."** (Emphasis supplied.)

In view of the caveat as to **solvent** banks in the above quotation from the **Gully** case, the binding effect of a voluntary waiver of immunity becomes subject to question. It is not certain that you would be completely immune from later attack by the Bank.

Your request is not clear as to the role of the Insurance Company "as the equitable owner." If your question is whether or not the Insurance Company may pay the mortgage filing tax for the National Bank as mortgagee, the above reasoning is applicable. This opinion is not directed, however, to a situation where the Insurance Company again records the mortgage after transfer from the Bank to the Insurance Company.

To reiterate, you may not legally accept payment of the proffered tax from the Bank (or from the Insurance Company for the Bank) since no mortgage filing tax exists against the Bank; since the State is without power to impose such a tax; and since it is highly doubtful that the Bank has the power to consent to the payment of such an illegal tax.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 19, 1950.

Hon. Phillip J. Hamm,
Commissioner of Revenue,
State Department of Revenue,
CAPITOL.

Licenses.

A drugstore operator who has a soda fountain from which he sells sandwiches must procure the licenses required by Title 51, Section 482 and 584, Code of Alabama 1940.

Opinion by Assistant Attorney General Parker.

Dear Sir:

Your request for an official opinion, bearing date of July 21, 1949, is as follows:

"It is requested that you furnish this office with an official opinion based on the following facts:

"'A' operates a regular drug store, in which he sells soft drinks from a soda fountain and is properly licensed under Title 51, section 482, Code of Alabama 1940. He also prepares and serves sandwiches from his soda fountain for which, of course, he makes charges.

"Would he be liable for a license under Title 51, section 584, Code of Alabama 1940 in addition to the license provided for by section 482, supra?"

Your attention is called to the following sections of Title 51, Code of Alabama 1940:

"§ 450. Who must procure state and county licenses.—Every person, firm, company, corporation or association, receiver or trustee, but not a governmental suddivision, engaged in any business, vocation, occupation, calling or profession herein enumerated, or who shall exercise any privilege hereinafter described for which a license or privilege tax is required, shall first procure a state license, and a county license when so required, and shall pay for the same, or shall pay for the exercise of such privilege the amounts hereinafter provided and comply with all other provisions of this title."

"§ 482. Cereal beverages, carbonated or other soft drinks; retailers.—Each person engaged in the business of selling at retail cereal beverages, carbonated or other soft drings, kept on hand and sold in bottles, shall pay an annual license of two and one-half dollars.

"Each person engaged in the business of selling soft drinks in a store or stand, conducting what is commonly known and called a soda fountain, including the right to sell at retail cereal beverages, carbonated or other soft drinks, kept on hand and sold in bottles, shall pay annually the following license: In unincorporated places, and towns and cities of not over five thousand inhabitants, ten dollars; in cities and towns of over five thousand and not over fifteen thousand inhabitants, fifteen dollars; in cities of over fifteen thousand and not over twenty-five thousand inhabitants, twenty dollars; in cities of more than twenty-five thousand inhabitants, twenty-five dollars."

"§ 584. Sandwich shops, barbecue stands, etc.—Each sandwich shop, barbecue stand or pit, hamburger or hot dog stand shall pay an annual license of five dollars."

"§ 838. Persons, firms, etc., engaging in several businesses.—Where any person, firm or corporation is engaged in more than one business which is made by the provisions of law subject to taxation, such incorporated company or person shall pay the tax provided by law on each branch of the business."

"§ 839. Two or more licenses on same business.—Wherever in this title two or more licenses on the same business or occupation are required, it is hereby declared to be the intention of the legislature that all such licenses as are herein levied shall be collected without credit or offset, except where specific provision is made therefor."

After considering the above-quoted statutes together, I am of the opinion that a drugstore operator who has a soda fountain from which he sells sandwiches must procure the licenses required by Section 482 and 584, supra. Quarterly Report of Attorney General, Volume 48, page 48; Quarterly Report of Attorney General, Volume 13, page 121.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 21, 1950.

Hon. J. C. Threadgill,
Secretary-Treasurer,
Board of Plumbers Examination and Registration of Alabama,
203½ North Pennsylvania St., Montgomery, Alabama.

Plumbers—Fees.

Under the provisions of Act No. 529, General Acts of Alabama 1949, page 827, approved September 2, 1949, a plumber who has been duly licensed less than two years must pay the examination fee provided for by Section 9 in order to be examined for a certificate of competency.

Opinion by Assistant Attorney General Parker.

Dear Sir:

Your request for an official opinion, bearing date of March 15, 1950, is as follows:

"Your attention is directed to Act No. 529, General Acts of Alabama 1949, page 827, Section 7 (Examination Fee) and Section 10 (Annual Certificate Fees).

"Under the above cited statute must a plumber who has been duly licensed as such under the general laws of the State of Alabama less than two years pay the Examination Fee provided for by Section 9, supra, in order to be examined for a certificate of competency as required by the law or would such a duly licensed plumber be entitled to be examined upon payment of the annual certificate fees provided for by Section 10 supra.

"Thanking you for your early opinion on the above question."

Section 9 and Section 10 referred to in your request are respectively as follows:

"Section 9. EXAMINATION FEE. Any person filing application to be examined as a master plumber, shall pay a fee of $25.00; and any person filing application to be examined as a journeyman plumber, shall pay a fee of $15.00. Said fees shall accompany the application and shall not be returnable.

"Section 10. ANNUAL CERTIFICATE FEES. Before any person engages in the business of master plumber, he shall secure an annual master plumber certificate for which he shall pay a certificate fee of $15.00. Before any person engages in the business of, or is employed as, a journeyman plumber he shall secure an annual journeyman plumbers certificate for which he shall pay a fee of $5.00. The certificates provided for herein shall be issued by the Board upon the payment of the prescribed fees. All annual certificates shall expire on December 31 of the year in which they are issued. The certificate fees herein prescribed shall be in addition to all privilege or license taxes otherwise levied."

Clearly Section 9, supra, refers to the examination required by Section 7 of Act No. 529. Section 7 provides in pertinent part that "The examination required of an applicant for a permit as a master plumber or journeyman plumber may be waived by the Board as to any person who furnishes satisfactory proof to the Board that he is a person of good moral character, and that he has been actively engaged as a master plumber or as a journeyman plumber, and duly licensed as such under the general laws of the State of Alabama, as the case may be, for at

least two years, provided that such person files an application in writing for waiver with the Board * * * ."

You will note that this exception applies only to applicants who have been duly licensed for more than two years. All applicants who have been licensed less than two years must take the examination required by Section 7. In order to take this examination he must comply with Section 9 and submit the fee therein required.

The fee set forth in Section 10 must be paid in order to receive a certificate and must be renewed annually. Its payment would not entitle an applicant to an examination for a certificate of competency, but must be paid by applicants who have successfully passed the examination of the Board in order to legally engage in the business of plumbing.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 24, 1950.

Hon. Dan Boyd,
Circuit Solicitor,
Randolph County,
Roanoke, Alabama.

Lotteries—Gift Enterprises.

A scheme, or plan, whereby the patrons of any given business establishment, upon payment of an admission fee, have their names placed in a container, with a name subsequently drawn therefrom, and a prize awarded the person whose name is so drawn upon his doing or performing some specified act, is violaof Section 65, Constitution of Alabama 1901, and Title 14, Section 275, Code of Alabama 1940, as constituting a lottery, or scheme in the nature of a lottery.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of February 8, 1950, is as follows:

"Will you please give me an opinion as to the validity vel non of the following plan:

"An operator of a business, e.g. a theatre, skating rink, swimming pool, baseball club, or for that matter any business, registers customers or guests who have paid a customary admission charge; names

or identifying numbers of the several customers are placed in a container and by chance one is drawn at a designated time; the person whose name or number is so drawn is then asked some question or to do some act, which if correctly answered or performed entitles that person to a reward.

"Is such plan a lottery or gift-enterprise violative of any of our state laws?

"I have studied a number of the decisions cited with Section 275, Title 14 and your opinion October 10, 1947 (O. R. Vol. 49 page 30). It seems to me that it is without doubt that the elements of prize and consideration obtain. But does the fact that the prize is **ultimately** awarded for knowledge or skill in answering the question or performing the act exonerate such plan? Phrased another way, under this plan is the prize "awarded by chance" or can it possibly be said to be awarded for merit?

"It is reported to me that some non-residents claim to have copywrited or patented such plan (this I doubt), and are telling local prospective buyers that the "knowledge or skill" element removes their plan from the lotter or gift-enterprise statute."

In my opinion, the scheme outlined by you in your request for opinion is violative of Section 65, Constitution of Alabama 1901, as well as Title 14, Section 275, Code of Alabama 1940, for the reason that such scheme contains all the constituent elements of a lottery, or a scheme, in the nature of a lottery. Lotteries, or any scheme in the nature of a lottery, are emphatically against the public policy of the State of Alabama. **Try-Me Bottling Company v. State,** 235 Ala. 207, 178 So. 231; **Johnson v. State,** 83 Ala. 65, 3 So. 790. In the case of **Grimes v. State,** 235 Ala. 192, 178, So. 73, the Supreme Court of Alabama set out the three elements necessary to constitute any given scheme or plan a lottery, or a scheme in the nature of a lottery. There are (1) a prize, (2) awarded by chance, (3) for a consideration.

Examining the instant plan or scheme in this light, it may be said without fear of contradiction that the first element, i. e., a prize, is unquestionably present. In my judgment, the opinion in the Grimes Case, supra, is full answer to the question of whether or not the element of consideration is present. In that case, in dealing with what we commonly know as "Theater Bank Nights" the Supreme Court stated:

"The very fact that it is a business enterprise intended to swell the receipts from paid admissions to the theater evidences an intention to garner a profit from the gift enterprise. * * *

"It is not of consequence whether either the operator or the patron has figured just how much of the admission charge is paid for the chance. 'Gift enterprise' in the nature of a lottery definitely

covers a lottery in aid of legitimate business, through colorable gifts, but in fact prizes awarded by chance for a price. * * *

"The results, the success of the plan in swelling the patronage, and consequently income through the scheme of chance are the final proof of a consideration paid and a consideration received. Certainly it cannot be questioned that such is the result intended by the bank night operator. Without it, the bank night would speedily cease to be."

This, in my opinion, is conclusive of the fact that the element of consideration is here present.

Turning now to the question of whether the prize here offered is awarded by chance, one must give consideration to the nature and detail of the current plan. As I understand from your inquiry, the name or identifying number of each person patronizing the place of business of the operator of this scheme is placed in a container and from such container a name or number is drawn. Thereupon the person answering to the name or number drawn is asked some question or required to perform some act, which, if he correctly does so, results in the prize being awarded to him.

The question is, therefore, is the prize awarded by chance as that term is used in connection with lotteries, gift enterprise or scheme in the nature of lotteries. Answer to this question, in my judgement, is to be found within the opinion rendered by the Supreme Court in the case of **Minges v. City of Birmingham**, 251 Ala. 65, 36 So. 2d 93. The Court there stated:

"The word 'chance' is used in different senses. In the sense now considered, Webster's New International Dictionary (second edition) defines 'chance' as 'something that befalls as the result of unknown or unconsidered forces; a happening in a particular way; the issue of uncertain conditions; a fortuity. An unforeseen or inexplicable cause or its operation; accident; as, to happen by chance.' And in 34 Am. Juris. page 649, section 6, it is said: 'Chance, as one of the elements of lottery, has reference to the attempt to attain certain ends, not by skill or any known or fixed rules, but by the happening of a subsequent event, incapable of ascertainment or accomplishment by means of human foresight or ingenuity. * * * Under the English rule, a lottery consists in the distribution of money or other property by chance, and nothing but chance, that is, by doing that which is equivalent to drawing lots. If merit or skill play any part in determining the distribution, there is no lottery. * * * **In the United States, however, by what appears to be the weight of authority at the present day, it is not necessary that this element of chance be pure chance, but it may be accompanied by an element of calculation or even of certainty; that is sufficient if chance is the dominant or controlling factor.** However, the rule that chance must

be the dominant factor is to be taken in the qualitative or causative sense, rather than the quantitative sense." (Emphasis supplied.)

In my opinion, in the practical operation of the scheme here described the dominating or controlling factor in the awarding of the prize offered is chance. As noted, the name or number of the persons selected to become a contestant for the prize offered is selected by pure chance, and nothing else. His or her name is drawn at random from a container holding the names of all other patrons of the business establishments. At this stage of the scheme, chance and nothing else is the controlling factor. The mere additional factor of such scheme requiring the person so selected to answer some question or perform certain acts, does not obviate the fact that such person has become a contestant for such prize by sheer chance. In my judgment, it is clear that chance is the dominating or controlling factor permeating the entire scheme so outlined.

This additional feature of requiring such person, selected by chance, to do or perform certain acts, in my opinion, is nothing more than a subterfuge seeking to bring the scheme without the influence of the Constitution and Statutes. This the law will not tolerate. **Johnson v. State,** 16 Ala. App. 425, 78 So. 419; In Re Opinions of the Justices, 225 Ala. 502. 144 So. 111; Quarterly Report of Attorney General, Vol. 49, page 30.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 28, 1950.

Mr. M. E. Cannon,
Clerk-Treasurer, Board of Revenue,
Covington County,
Andalusia, Alabama.

Elections—Election Officials—Method of Payment.

A county may adopt any method it sees fit in paying election officials.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of April 19, 1950, is as follows:

"We have been using a system for paying election officials whereby the sheriff would issue a certificate (copy enclosed) to the official serving, which certificate would be honored at the bank so designated on it. The bank in turn notified this office at the end of the day or

sometimes at the end of the week the amount of these certificates that had been cashed. This office would then issue a County Warrant for the amount and attach the election certificate to the claim as supporting evidence. This system was instituted several years ago in an effort to make it more convenient and to speed up the payment of the election officials. The plan being used was suggested by the Department of Examiners of Public Accounts.

"The question has now come up in our County as to the legality of the above method of paying election officials. Would you please give us your official opinion as to the legality of this question. I would appreciate your opinion as quickly as possible as we have an election on May 2nd."

The duty of paying the election officials devolves upon the County. The County acts through the County Governing Body. A great deal of discretion is vested in the County Governing Body as to the manner in which this duty is discharged. The County Governing Body might adopt one of several different methods in paying the election officials. Over the State, several different methods are used. The County Governing body may adopt and put into effect any reasonable and legal method it may choose. It might pay the election officials by and through the Chief Clerk in the office of the Probate Judge, by and through one of the members of the Commissioners Court, by the method now used or any other reasonable and legal method. Perhaps the most regular and natural way to handle the matter would be for the County Governing Body to set forth in a regularly adopted resolution the exact manner in which the governing body desires the matter handled. While I see nothing illegal in the plan and method now in effect, perhaps a more direct method handling of the matter by the Court would be more regular. As to this, however, much descretion is vested in the County Commissioners or the County Governing Body.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 3, 1950.

Hon. Wm. T. Seibels,
Circuit Solicitor,
Montgomery County,
Montgomery 4, Alabama.

Advertisements and Advertising—Gaming and Lotteries.

1. Where a merchant advertises a "Going-Out-of-Business Sale," but entertains no **bona fide** intent to discontinue that particular business upon termination of the sale, such advertising is untrue, deceptive and misleading and constitutes a misdemeanor within the meaning of Title 14, Section 211, Code of Alabama 1940.

Proof of a general replenishment of stock during the sale would be strongly indicative of the merchant's intent to continue in business.

2. Where a merchant places on sale at a uniform price so-called "prize packages," some of which he represents as containing merchandise greater in value than the sale price of the package, such a scheme is in the nature of a lottery and is in violation of Section 65, Constitution of Alabama 1901, and Title 14, Section 275, Code of Alabama 1940.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion, bearing date of April 13, 1950, is as follows:

"The Jewelers' Association of Montgomery have propounded to me a question which I am just unable to answer, and I would like, if I could, to get an opinion from your office.

"The Freehling Jewelery Company here in Montgomery has advertised for some time that it is going out of business and is conducting a sale on that basis. The other jewelers are complaining that this company is not going out of business, but just renewing its stock from warehouses it has in this city, and other sources. The Association thinks this is unfair trade practice, and have asked me if there is any way to prevent such practice going on.

"Query number two. The Association also stated, and can prove, that the Freehling Jewelry Company is selling packages wrapped up at a price of $2.50 a package; that the purchaser of a package is liable to get something worth $15 or $20 in value, or something worth less than $2.50. Is this device in the nature of a lottery?

"I will appreciate an opinion from your office on these two points."

1. Your first question is answered in the affirmative.

Title 14, Section 211, Code of Alabama 1940, in pertinent part provides:

"(a) No person, firm, corporation or association shall, with intent to sell or in anywise dispose of real estate, merchandise, securities, service, or anything offered by such person, firm, corporation or association, directly or indirectly, to the public for sale or distribution, or with intent to increase the consumption thereof, or to induce the public in any manner to enter into any obligation relating thereto, or to acquire title thereto, or an interest therein, make, publish, disseminate, circulate, or place before the public, or cause, directly or

indirectly, to be made, published, disseminated, circulated, or placed before the public, in this state, in a newspaper or other publication, or in the form of a book, notice, handbill, poster, bill, circular, pamphlet, or letter, or in any other way, an advertisement of any sort regarding real estate, merchandise, securities, service, or anything so offered to the public, which advertisement contains any assertion, representation or statement of fact which is untrue, deceptive or misleading."

Section 211, supra, has for its purpose the preventing of defrauding of the public by inducing the purchase of articles through false or misleading statements contained in advertisements. It is similar to Title 14, Section 209, Code of Alabama 1940, the said section being the statute against false pretenses. **Parisian Co. v. Williams,** 203 Ala. 378, 83 So. 122; Biennial Report of the Attorney General, 1922-1924, page 95.

In view of the penalties prescribed by Section 211, supra, violation of which is punishable by maximum fine of one thousand dollars or by a maximum jail sentence of sixty days, or by both fine and imprisonment, it may safely be assumed that any merchant advertising a "Going-Out-of-Business Sale" would contend that he entertains a **bona fide** intent to discontinue business immediately upon sale of his existing stock-in-trade. Whether or not the merchant entertained such an intent would be the prime factual issue in any prosectuion under Section 211, supra. A jury would be expected to draw inferences from other proven facts and circumstances. Proof that the merchant constantly was replenishing his stock, during the sale, doubtless would have strong weight with a jury. On the other hand, counter-proof by the merchant that he replenished only minor items of relatively small value, compared with the total value of all stock-in-trade on sale would lessen the criminating force of such proof. Merchants generally will agree that certain types of sales cannot successfully be run without replenishing certain indispensable and fast moving items.

I am of the opinion, therefore, that where a merchant advertises a "Going-Out-of-Business Sale" and where it is shown by competent proof beyond a reasonable doubt that the merchant does not entertain a **bona fide** intent to discontinue that particular business upon termination of the sale, such advertising is untrue, deceptive and misleading and is in violation of Section 211, supra. The evil is found in the public's inducement to buy upon the justifiable assumption that any advertised sale by a merchant going out of business implies greater bargains than would be expected if the merchant were not going out of business. In my further opinion the inherent problem of proof of a violation of Section 211, supra, is usually, though not exclusively, answered by proof of a calculated and general replenishment of stock-in-trade during such a sale.

2. Your second question is also answered in the affirmative.

Lotteries, and gift enterprises or schemes in the nature of a lottery, are emphatically against the public policy of this state, being prohibited

by both constitutional and statutory law. Section 65, Constitution of Alabama 1901; Title 14, Section 275, Code of Alabama 1940. They have been described as "the vicious system of lottery schemes and the evil practice of gaming, in all their protean shapes, tending as centuries of human experience now fully attest, to mendicancy and idleness on the one hand, and moral profligacy and debauchery on the other. **"Johnson v. State,** 83 Ala. 65, 3 So. 790; **Try-Me Bottling Co. et al v. State,** 235 Ala. 207, 178 So. 231.

The essential elements of a lottery are: (1) a prize, (2) awarded by chance, (3) for a consideration. **Grimes v. State,** 235 Ala. 192, 178 So. 73; **Try-Me Battling Co. et al v. State, supra; Minges et al v. City of Birmingham,** 251 Ala. 65, 36 So. 2d 93; **Opinion of the Justices,** 249 Ala. 516, 31 So. 2d 753; Quarterly Report of the Attorney General, Vol. 57, page 86; Quarterly Report of the Attorney General, Vol. 49, page 30. The multiplicity and variety of schemes designed to evade the Lottery Laws have been limited only by human ingenuity. If the essential elements of a lottery be found to exist, the courts consistently have struck down such schemes as games of chance. If these elements be present, a lottery is present no matter by what name the venture be called. **Grimes v. State,** 28 Ala. App. 4, 178 So. 69.

In testing the "prize package" scheme described in your second question against these essential elements, I am forced to the conclusion that the scheme is in the nature of a lottery and is prohibited by Section 65 and 275, supra. Its essence is the hazarding of money in the hope of gain. Selection of the package is a matter of pure chance, the prizes are hidden in those packages containing merchandise greater in value than the sale price of the package, and consideration is found in the price paid for the package.

I note that you state that it can be proved that the customer may, by chance, select a package containing merchandise worth less than the $2.50 sale price of the package. In my judgment such proof is not significant, since a lottery still would exist even though the merchant guaranteed that each package contains merchandise worth the sale price of such package. The speciousness of the argument that, in such case, the customer pays nothing for the chance clearly was shown in **Grimes v. State,** supra, and **Try-Me Bottling Co. et al v. State,** supra. These decisions demonstrate that consideration is found in the price paid for the merchandise, even though the lottery scheme entails no increase of price to the customer.

Such schemes lure to improvidence, in that they induce many persons to purchase merchandise of no value to them on the hazard that they may obtain something of far greater value. Similar "prize package" schemes have been condemned as lotteries in other jurisdictions. See **Holoman v. State,** 2 Tex. Ct. App. 610, 28 Am. Rep. 439; **Wolf v. Federal**

Trade Commission (C. C. A.—7th), 135 Fed. 2d 564; **Keller et al v. Federal Trade Commission** (C. C. A.—7th), 132 Fed. 2d 59.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 8, 1950.

Hon. Frank A. Reagan,
Judge of Probate,
Etowah County,
Gadsden, Alabama.

Counties—Newspapers.

To comply with Title 7, Section 724, Code of Alabama 1940, as amended, in a county with a population of less than 400,000, the clerk of the circuit court, the register, and the judge of probate must each subscribe to and keep on record a copy of each weekly newspaper published in said county.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion bearing date of February 13, 1950, is as follows:

"We have moved into our new Court House and have a general record room for all the different Courts.

"Under Section 724 of Title 7 of the 1940 Code of Alabama, it states that the Clerks of the Circuit Court, the Registers and the Probate Judge must subscribe for and take, and file in their respective offices, —one copy of each newspaper published in their respective Counties and have same bound as soon as practical each year. We all use the record room as part of our offices, Circuit Clerk, Register and Probate Judge.

"To comply with this Section and Title, would one paper for the three offices be sufficient. This would mean a big saving for the County.

"An early reply will be appreciated."

It is my opinion that in a county with a population of less than 400,000, the keeping on record in the general record room of the clerk of the circuit court, the register, and the judge of probate of one copy of each weekly newspaper published in said county is not sufficient to comply with Title 7, Section 724, Code of Alabama 1940, as amended.

Section 724, as amended, supra, reads as follows:

"The clerks of the several circuit courts, the registers, and judges of the several courts of probate, must subscribe for and take, and file in their respective offices, one copy of each weekly newspaper published in their respective counties, and as soon as practicable, after the end of each year, shall cause the number of such papers for the preceding year to be well bound, and shall keep the same safely in their respective offices, as the property of their respective counties; and the court of county commissioners must allow to such officers the sums paid by them for such subscription and binding. The duties hereinabove imposed on clerks of the circuit court and registers shall not apply to clerks of the circuit courts and registers in counties having a population of 400,000 or more according to the last or any future federal census."

The 1945 amendment added the second sentence. Act No. 9, General Acts 1945, page 27.

It is obvious from this amendment that the Legislature recognized that the clerks of the circuit courts, the registers, and the judges of probate of the respective counties were each subscribing to and keeping on record a copy of each weekly newspaper published in their respective counties. The Legislature has not been inclined to change this law, except as to counties with a population of 400,000 or more. This office does not have the power to do that which the Legislature has not seen fit to do.

Therefore, answering your inquiry specifically, it is my opinion that in order to comply with Section 724, as amended, supra, in a county with a population of less than 400,000, the clerk of the circuit court, the register, and the judge of probate must each subscribe to and keep on record a copy of each weekly newspaper published in said county.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 8, 1950.

Hon. G. H. Boyd,
Register, Circuit Court,
Tenth Judicial Circuit of Alabama,
Jefferson County,
Birmingham 3, Alabama.

Elections—Absentee Voting.

1. In order for one to come within the purview of those provisions of Act No. 424, General Acts of 1949, page 601, applicable to members of the Armed Forces of the U. S., such person must presently be a member of the Armed Forces, now serving therein.

2. A person, not otherwise enlisted in any branch of the Armed Forces of the U. S., merely undergoing hospitalization in a government hospital, is not a member of the Armed Forces of the U. S. and is not serving in the Armed Forces of the U. S.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion bearing date of April 10, 1950, is as follows:

"I am advised by several Attorneys of Birmingham that under Act Number 422, H. 351, Regular Session, 1949, to provide for absentee voting, a veteran of the United States Armed Forces is a member of the Military Service on active duty so long as he is confined to a Government Hospital, subject to Government regulations, within the meaning of the Act.

"Since there are several thousand veterans affected by this Act who are unable to cast absentee ballots in the coming primaries unless the Act I have referred to is correct, I would appreciate it if you will answer the inquiry herein made at your very earliest possible convenience.

"As you know, the applications for absentee ballots must be filed not less than five days before the Primary, so immediate action is urgent."

In your inquiry you undoubtedly intend reference to Act No. 424, General Acts 1949, page 601, which act now governs, in all respects, the casting of absentee ballots in elections within this State. The portion of said act pertinent to your inquiry is to be found within Section 9 thereof, wherein provision is made for the casting of absentee ballots by qualified electors of this State who are members of the Armed Forces of the U. S. and presently serving therein. The following language is there used:

"Any prospective absentee voter meeting the requirements of Section 2, above, who is a member of the Armed Forces of the United States of America, may, not more than forty nor less than five days prior to the election at which he desires to vote, make application by United States mail in writing, to the register or person designated to serve instead of the register, for an absentee ballot as herein provided to be made by a prospective voter in person. Such application shall have attached thereto a certificate signed by the commanding officer of such person, certifying that such person is then serving in the Armed Forces of the United States. The affidavit herein provided to be attached to the absentee ballot shall be executed by the prospective voter in person before his commanding officer who shall certify to such fact."

It is apparent from the above, that said provision has application only to persons presently members of the Armed Forces and now serving therein. A person acquires no status under said provision by virtue of former military service, and such a person stands in no better position than any other with regard to the casting of absentee ballots.

Each application must, therefore, be governed by the status of the person requesting same. Such applicant must be a member of the Armed Forces, presently serving therein. This fact must be certified to by the commanding officer of the applicant. It is obvious, therefore, that to be deemed a member of the Armed Forces of the U. S. such person must be assigned to and serving in some capacity with some unit or agency of the military. It is not enough that such person merely be a patient within a hospital operated by the U. S. Government and, therefore, subject to the rules and regulations of the hospital. Such, in no sense, makes one a member of the Armed Forces of the U. S., unless such person be presently enlisted or serving in some branch of the Armed Forces.

The fact that a person, by reason of former military service, is entitled to certain benefits of hospitalization and sees fit to utilize such benefits does not mean that such person continues a member of the Armed Forces of the U. S., and such period of hospitalization does not constitute serving in the Armed Forces of the U. S. In short, to be a member of the Armed Forces of the U. S. one must presently be enlisted in, or serving in some branch of the Armed Forces, and any person whose services has been terminated by discharge of any nature, and who has not subsequently re-enlisted within some branch of the Armed Forces, is not a member thereof despite the fact he might be undergoing hospitalization within a government hospital.

I must, therefore, advise you that the contentions of those persons mentioned by you in your inquiry in this regard are founded upon an incorrect interpretation of Act No. 424, supra.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 17, 1950.

Hon. Ralph P. Eagerton,
Chief Examiner of Public Accounts,
CAPITAL.

Judges of Probate—County Courts—Fees.

The compensation received by a judge of probate for ex officio services as judge of the county court, or a like inferior court, is "compensation from his office" as judge of probate within the purview of Title 11, Section 29, Code of Alabama 1940.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of May 11, 1950, is as follows:

> "There is presently an examination in progress and there has arisen a question the answer to which is necessary in order to properly complete the examination. I will appreciate it very much if you will give this question your immediate attention and advise me as follows:
>
> "In computing the net annual compensation of the office of a probate judge in order to determine whether the net annual compensation of the office is in excess of $5,000.00, should the amounts drawn by the probate judge for his services as judge of the county court, or, for that matter, any inferior court or like court created by local act making the probate judge ex-officio judge of such court, be included as earnings, compensation or income of the office? The necessity of our determination of the net annual compensation of the office is obvious from the requirements and provisions of Section 29, Title 11, Code of Alabama 1940."

I am of the opinion that your inquiry should be answered in the affirmative.

Title 11, Section 29, Code of Alabama 1940, insofar as it pertains to your inquiry, provides as follows:

> "§ 29. Fees allowed to judges of probate.—Judges of probate are entitled to the following services:
>
> ". . . . . .
>
> "Discharging his duties in relation to public roads, on proof to the county commissioners that he has discharged such duties, annually, to be paid out of the county treasury, not exceeding $400.00.
>
> "But this shall not apply to any probate judge who receives **net annual compensation from his office** exceeding five thousand dollars. (Emphasis supplied.)
>
> ". . . . . ."

The term "net annual compensation" means the difference between the total amount earned by the officer and his operating expenses.—Quarterly Report of Attorney General, Volume IV, page 40.

The general law, Title 13, Section 313, Code of Alabama 1940, provides that the judges of probate shall be judges of the county courts of their respective counties. Section 314 of said Title fixes the compensa-

tion of judges of the county courts on a graduated scale, based on a population classification. There are local acts to like effect in regard to like inferior courts with different compensation.

The question presented by your inquiry is whether the phrase "compensation from his office," as used in Title 11, Section 29, supra, embraces the moneys received by a judge of probate for his services as judge of the county court under the general law, or as judge of a like inferior court created by local act. In my judgment, this query should be answered in the affirmative.

The compensation provided for judges of such courts enures to the benefit of the respective judges of probate by virtue of the fact that they hold the offices of judges of probate. If an individual did not hold the office of judge of probate, he would not be entitled to the compensation as judge of the county court, or a like inferior court. A judge of probate is merely the ex officio judge of such court. It follows that the compensation received by a judge of probate for ex officio services as judge of the county court, or a like inferior court, is "compensation from his office" as judge of probate, within the purview of Title 11, Section 29, supra.—Cf. Quarterly Report of Attorney General, Volume II, page 308; Opinions of Attorney General, Volume 2A, page 64 (Office Edition).

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 17, 1950.

Hon. John B. Sockwell,
Judge of Probate,
Colbert County,
Tuscumbia, Alabama.

Filing Tax—Corporations—United States.

1. Deed filing tax due on deed from instrumentality or agency of United States to private corporation, not being exempt from tax, reciting cash consideration paid under contract with another corporation and a purchase money mortgage to instrumentality of United States, including accrued interest on said mortgage, is based on actual value of property conveyed, under Title 51, Section 618, Code of Alabama 1940.

2. Mortgage to instrumentality or agency of United States not subject to mortgage filing tax, and, therefore, there is no mortgage tax deductible from deed filing tax.

3. Accrued interest on mortgage should not be considered in determining value of property conveyed.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of May 9, 1950, is as follows:

"We respectfully request an opinion on the following:

"There has been presented to this office for record a quitclaim deed from the General Services Administration, acting on and in behalf of the Reconstruction Finance Corporation and the United States of America, to Robbins Floor Products, Inc., an Alabama corporation, conveying certain real estate and personal property in Colbert County, Alabama, and reciting a cash consideration paid under contract by Robbins Tire and Rubber Company, an Alabama corporation, of $450,397.70 and the further consideration represented by a purchase money mortgage of the sum of $583,363.98, of which sum $35,761.88 is accrued interest due under the sales contract with Robbins Tire and Rubber Company. The purchase money mortgage above referred to has also been presented to this office for recording and is executed by Robbins Floor Products, Inc., an Alabama corporation, to General Services Administration, Reconstruction Finance Corporation, and the United States of America, and shows the balance of purchase price at $583,363.98, of which the sum of $35,761.88 is accrued interest by reason of the said sales contract with Robbins Tire and Rubber Company. The deed tax has been calculated on the entire consideration recited in the deed and amounts, according to said calculation, to $1034.00 as provided by Section 618 of Title 51 of the 1940 Code of Alabama.

"The officials of Robbins Floor Products, Inc., contend that these instruments are (1) not subject to the tax; (2) that the amount paid by Robbins Tire and Rubber Company under contract, viz., $450,397.70, should not be included in computing the deed tax; (3) and that $35,-761.88, which is accrued interest, should likewise be excluded in computing the deed tax. Counsel for Robbins Floor Products, Inc., has cited the cases of Alabama vs. King and Boozer, 314 U. S. 1, 86 L. Ed. 3, and U. S. vs. Company of Alleghany, 322 U. S. 174, 88 L. Ed. 1209, as authority.

"This ofice has refused to accept said conveyances for record until the deed tax of $1034.00 is paid, but has agreed to hold said documents pending an opinion from your office."

I am of the opinion that the proper deed tax collectible on the instrument in question, under Title 51, Section 618, Code of Alabama 1940, should be based on the actual value of the property conveyed.

The deed filing tax is to be calculated on the value of the property conveyed by the deed offered for record without regard to the recitals

of the consideration therein.—Quarterly Report of Attorney General, Volume 26, page 72. However, the recitals of a consideration in any instrument conveying property or an interest therein is prima facie proof of the payment of a valuable consideration and if the consideration is expressed in dollars, the amount so expressed will be presumed to be the agreed value of the property or interest and to be the actual consideration until and unless rebuttal by evidence to the contrary.—Quarterly Report of Attorney General, Volume 17, page 265, and cases cited therein.

No mortgage filing tax would be due on the filing of the purchase money mortgage from the Robbins Floor Products, Inc., as mortgagor, to General Services Administration, Reconstruction Finance Corporation, and United States of America (the Federal Government or instrumentality or agency thereof), as mortgagee, under Title 51, Section 619, Code of Alabama 1940, even though it may be offered for record by the mortgagor.—Quarterly Report of Attorney General, Volume 28, page 122. Therefore, there would be no value in excess of any mortgage or vendor's lien on the property **on which the mortgage tax has been paid** to the deducted from the deed tax due under Title 51, Section 618, supra; and the deed tax is calculated on the entire value of the property conveyed.—Quarterly Report of Attorney General, Volume 14, pages 99 and 146; Quarterly Report of Attorney General, Volume 26, page 72, supra.

There is no exemption from deed filing tax on instruments executed by instrumentalities or agencies of the Federal Government, as grantors, to private individuals or private corporations, as grantees.—Quarterly Report of Attorney General, Volume 14, page 146, supra; Quarterly Report of Attorney General, Volume 26, page 72, supra.

The deed in question was made to the Robbins Floor Products, Inc., as grantee. The fact that the cash consideration was paid under contract with Robbins Tire and Rubber Company, a separate and distinct corporation, does not warrant an exemption.—See **Hawkins vs. Pure Oil Co.**, 232 Ala. 660, 169 So. 307.

Applying the above to the facts in the instant case, it appears that the recited consideration of the value of the property conveyed is cash consideration of $450,397.70 plus the amount of the mortgage, which is $583,363.98 less accrued interest of $35,761.88. I do not think the accrued interest should be considered in determining the value of the property. Assuming the recited consideration represents the actual value, the deed filing tax should be based on a valuation of $450,397.70 plus $583,363.98 less $35,761.88, which equals $997,999.80. Since there is no tax paid on the filing of the mortgage, there is no mortgage filing tax to deduct.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 17, 1950.

Hon. R. E. Charlton,
Clerk, Town of Autaugaville,
Autauga County,
Autaugaville, Alabama.

Municipalities—Cemeteries—Funds.

1. A city or town may expend funds received by it under the provisions of Title 29, Sections 10 and 11, Code of Alabama 1940, as its share in the net profit derived from the proceeds of the Alabama liquor stores for the purchase of land for cemetery purposes, unless such funds have been pledged for the payment of an obligation owed by the city or town.

2. A city or town may legally expend 20% of the amount received from motor vehicle and trailer licenses taxes under the provisions of Title 51, Section 713, Code of Alabama 1940, as amended by Act No. 471, General Acts 1949, page 688, for the purchase of land for cemetery purposes, unless such funds have been pledged for the payment of an obligation owed by the city or town.

3. A city or town may not legally expend any amount received by it from the State gasoline tax under the provisions of Title 51, Section 657, Code of Alabama 1940, as amended by Act No. 20, General Acts 1943, page 20, for purchasing land for cemetery purposes.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of April 27, 1950, is as follows:

"Is there a law that would prohibit the Town of Autaugaville from legally buying a plot of land about one mile from the Town Limits paying for it with revenue received by the town from A. B. C. Gasoline and Auto License Funds?

"Said lot to be adjoining present community cemetery and divided into burial lots and these lots sold by the Town to people desiring them. Present community cemetery does not now have an available vacant lot.

"If this plan is not legal we will welcome a suggestion as to how the Town can handle this project so as to have control of this proposed addition to the cemetery."

Cities and towns have authority to purchase land within or without their corporate limits for cemetery purposes, and to regulate, maintain, and control such cemetery. Title 37, Section 478, 507, Code of Alabama 1940.

Under the provisions of Title 29, Sections 10 and 11, Code of Alabama 1940, the municipalities of the State share in a certain percentage of the net profit derived from the proceeds of the Alabama liquor stores. The funds received by the municipalities from such source are not earmarked and may be expended for any lawful municipal purpose. It is therefore my opinion that such funds, unless pledged for the payment of obligations owned by the city, may be used for the purchase of land for cemetery purposes.

Under the provisions of Title 51, Section 713, Code of Alabama 1940, as amended by Act No. 471, General Acts of 1949, page 688, the incorporated city or town in which the owner of a motor vehicle resides receives 30% of the amount collected as motor vehicle and trailer license taxes, less certain expenses incurred in the collection of such taxes. As to the expenditure of such funds, Section 713, as amended, supra, provides in part as follows:

> "All amounts of motor vehicle and trailer license taxes received by a city or town hereunder in excess of twenty percent of such motor vehicle and trailer license taxes shall be used exclusively for the construction, improvement and maintenance of highways or streets and administrative expenses in connection therewith, including the retirement of bonds for the payment of which such revenues may have been pledged, and for no other purposes."

It is therefore my conclusion that a city or town may legally expend 20% of the funds received from motor vehicle and trailer license taxes under the provisions of Section 713, as amended, supra (unless such amount is pledged for the payment of obligations owed by the city or town), for the purpose of purchasing land for cemeteries. However, the remaining 80% of such funds so received must be expended as provided in said section.

Title 51, Section 657, Code of Alabama 1940, as amended by Act No. 20, General Acts 1943, page 20, provides for the distribution of a certain amount of the State gasoline tax to the several municipalities of the State. As to the expenditures of the amount of such tax so received by the municipalities, said section provides in part as follows:

> "All moneys received by municipalities under this Section shall be used exclusively for the construction, improvement and maintenance of highways or streets and administrative expenses in connection therewith, including the retirement of bonds for the payment of which such revenues may have been pledged, and for no other purposes."

It follows that a city or town may not legally expend any amount received from the State gasoline tax under the provisions of Section 657, as amended, supra, for the purchase of land for cemetery purposes.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 22, 1950.

Hon. W. W. Dinning,
City Attorney,
Marengo County,
Demopolis, Alabama.

Municipal Corporations — Hospital Associations — Board of Directors.

1. Under the provisions of Title 37, Section 7, Code of Alabama 1940, all cities of this State, not otherwise provided for within said Title, must be subdivided into wards, the number of such wards, not less than three nor more than fourteen, being left to the discretion of the municipal governing body.

2. If a city organizes a hospital association under the provisions of Act No. 211, General Acts 1945, page 330, there is no prohibition against the mayor or other chief executive officer being designated as a member of the board of directors of such association.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of January 7, 1950, is as follows:

"In Re: Proposed Hospital Association, City of Demopolis, Alabama.

"In my capacity as City Attorney of the City of Demopolis, Alabama, I am writing to you at the request of the Honorable N. B. Fields, Mayor of said City, to ask that you give your opinion on the following points:

"1. Inasmuch as the City of Demopolis, a municipal corporation, has never been divided into precincts, wards or beats, and has no precincts, wards or beats set out in its territorial limits, may said City, under and according to the provisions of Section 204(11) of Title 22 of Code of Alabama 1940, as amended, set up and form a hospital association as contemplated therein, and appoint as directors of

said hospital association citizens of said City who are qualified electors of said City and of Marengo County, Alabama?

"II. If the City of Demopolis may form a hospital association as set out in question I, is there any restriction or provision which would prevent the appointment of the Mayor of said City as either a director or as Chairman of the Board of Directors of said hospital association?

"Mayor Fields will greatly appreciate an answer to the above questions at your earliest convenience."

In your request for opinion, you advise that the City of Demopolis has never been subdivided into wards, and predicated on this fact you inquire as to whether or not such city may organize and form a hospital association under the provisions of Act No. 211, General Acts 1945, page 330.

In giving answer to such inquiry, I must, of necesity, consider the provisions of Title 37, Section 7, Code of Alabama 1940. Such statute provides as follows:

"§ 7. Wards, Municipalities divided into.—The councils of the several cities may, by ordinance, divide such city into not less than fourteen wards, except as otherwise provided herein, and the numbers and boundaries of such wards may be fixed and changed at any time, except as herein restricted. The several councils, respectively, of cities, at least six months previous to the first general municipal election held under the provisions of this title, shall divide such cities into wards, having as nearly as may be the same number of inhabitants, the lines thereof conforming to the center of the streets or alleys, and being rectangular as far as practicable. Ward lines having once been fixed, shall not be changed by the council within three months previous to an election, nor within eighteen months of the time last established, except in the case of a census showing a population authorizing a change in the form of government, or unless within such time additional territory shall have been annexed to such city, when such councils shall have the right to create new wards or annex such territory to wards already established.

"Whenever the population of any city exceeds fifty thousand, the council may increase the number of wards thereof, one ward for every four thousand population over fifty thousand."

This statute has application to all cities, i.e. municipal corporations containing two thousand or more inhabitants, not otherwise expressly mentioned within Title 37, and, in my judgment, requires that such cities be subdivided into wards, the number of such wards, not less than three nor more than fourteen, being left to the discretion of the municipal governing body. The City of Demopolis according to the official U. S. census of 1940 had a population of four thousand one hundred thirty-

seven persons, and hence comes within the purview of this statute. Compliance with such statute by the City of Demopolis will eliminate the necessity of answer to your first inquiry.

In answer to your second inquiry, I would advise that I find nothing within the provisions of Act No. 211, supra, which prohibits the mayor, or other chief executive officer of a municipality, from serving as a member of the board of directors of any hospital association organized by such municipality under the provisions of said Act.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 24, 1950.

Hon. D. Hardy Riddle,
Judge of Probate,
Talladega County,
Talladega, Alabama.

Licenses.

Licenses are required for cold storage spaces less than twenty-five thousand cubic feet in capacity which are utilized for storage of food products at wholesale.

Opinion by Assistant Attorney General Nachman.

Dear Sir:

Your request for an official opinion, bearing date of April 24th, 1950, is as follows:

"Re: Title 51, Section 566. Packing houses, Cold storage plants, etc.

"We have in Talladega County several wholesale grocers who maintain small cold rooms for the storage of their perishable merchandise. One typical such cold room or cold storage room, being 12 feet by 12 feet by about 10 feet high. They certainly do not come anywhere near being of the cubic capacity of any bracket set out in the above section.

"These people have been cited to obtain a license under the above title and section by an agent of the State Department of Revenue.

"At your earliest opportunity please give me a ruling as to whether these people are or are not liable for the license under the above section."

It is my opinion that your inquiry should be answered in the affirmative.

Your request implies that these "cold rooms" are utilized for the storage of food products in connection with their sale at wholesale. This being the case, the rooms are within the language of Title 51, Section 654, Code of Alabama 1940. This section specifically directs that license fees be paid where storage capacity is **less than** twenty-five thousand cubic feet. The very small capacity of the storage spaces in question cannot alter the legislative requirement.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 24, 1950.

Hon. Ward W. McFarland,
State Highway Director,
CAPITOL.

Highways and Highway Department—Deeds—Taxation.

Deed conveying to the State Highway Department or any State agency real property purchased by the agency are not subject to the federal stamp tax imposed by Internal Revenue Code § 3482.

Opinion by Assistant Attorney General Nachman.

Dear Sir:

Your request for an official opinion, bearing date of April 7, 1950, is as follows:

"Re: Payment of Federal Deed Tax Where State or Its Agencies Is Grantee.

"Your official opinion is requested as to whether this Department or any agency of the State is required to pay the Federal deed tax on conveyances wherein the State or an agency of the State is the grantee.

"This question has been raised several times recently with reference to the recordation of conveyances for right-of-way purposes to this Department and to various counties. It is not believed that the State or any of its agencies are liable for the payment of this tax. As you know, this tax requires Federal Reserve stamps in the amount of $1.10 for each $1,000.00 of consideration to be paid on conveyances."

Deeds conveying to a State or a political subdivision of a State real estate purchased by it are not subject to the federal stamp tax imposed

by Int. Rev. Code § 3482. 4 CCH 1950 Fed Tax. Rep. Para. 2986.089. In S. T. 897, 1940-1 Cum. Bull. 256 it was ruled that a conveyance of realty to a local housing authority which was an instrumentality of either a state or political subdivision thereof, was not subject to the tax. A Bureau of International Revenue letter, dated August 6, 1942, 3 CCH 1942 Fed. Tax Rep. Para 6459 stated that a deed conveying title to real estate to township school trustees was tax-free. These rulings indicate that such deeds conveying to any state agency or instrumentality are not liable for the federal tax. Moreover, **Informal Ruling**, No. 21, July 19, 1932, 2 CCH 1932 Fed. Tax Rep. p. 2347 specifically declared that deeds conveying realty to State Highway Commissions were not subject to the tax.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 24, 1950.

Hon. Bankhead Bates, Director,
Department of Public Safety,
CAPITOL.

Highways and Highway Department—Motor Vehicles—Municipalities.

1. Section 3 of Act No. 516, General Acts 1949, page 740, vests in the Director of Public Safety and the Highway Director, with the approval of the Governor, after an engineering and traffic investigation, power and authority to increase or decrease the prima facie lawful speed limits fixed by Title 36, Section 5, Code of Alabama 1940.

2. The question of motor vehicle speed in any given locality, except in the corporate limits of cities and towns, is by Section 3 of Act No. 516, General Acts 1949, page 740, left entirely to the sound judgment and discretion of the Director of Public Safety and the Highway Director, with the approval of the Governor, after a proper traffic and engineering investigation has been made.

3. Section 3 of Act No. 516, General Acts 1949, page 740, does not vest in the Director of Public Safety and the Highway Director, or either, power and authority to fix motor vehicle speed limits on highways within the corporate limits of cities and towns, since such power and authority remain vested in the cities and towns under the provisions of Title 37, Section 649-650, Code of Alabama 1940.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion, bearing date of March 3, 1940, is as follows:

"Certain questions have arisen as to the authority of the Director of Public Safety and the Highway Director, with the approval of the Governor, to establish and maintain speed zones as provided under the provisions of Section 3 of Act Number 516, General Acts 1949, page 740.

"This Section authorizes the Director of Public Safety and the Highway Director, with the approval of the Governor, to determine upon the basis of an engineering and traffic investigation the proper speed to be observed by motor vehicles under certain conditions and in certain areas throughout the State of Alabama.

"In view of Section 3, of Act Number 516, and Section 5 of Title 36, supra, your official opinion is requested on the following:

"1. Is Section 5 of Title 36 controlling as to speed limits in certain areas, or may the Director of Public Safety and the Highway Director, with the approval of the Governor, under the provisions of Section 3, supra, after an engineering and traffic investigation of conditions found to exist have been completed change or alter, either by increasing or decleasing, the speed allowed under Section 5 in those areas referred to therein?

"2. Do the provisions of Section 3 of Act Number 516 have the effect of superseding or repealing the provisions of Section 5, Title 36?

"If your answer to question 2 is in the affirmative, then does it not necessarily follow that the question of speed in any given locality within the State of Alabama is left entirely to the discretion of the Director of Public Safety and the Highway Director, with the approval of the Governor, after a proper traffic and engineering investigation has been made, as provided in Section 3, supra.

"3. In certain areas of the State of Alabama, the municipal limits of certain municipal corporations have been extended greatly beyond the business and residential sections of said municipal corporations. These sections are traversed by State Highways, some of them being the main arterial highways of the State. In cases such as these does the Director of Public Safety and the Highway Director, with the aproval of the Governor, have the authority to regulate the speed limit in those districts, regardless of the fact the speed limit is sought to be fixed is located within the corporate limits of a municipality, but not in its business or residential district?"

1. Answering your first question, I am of the opinion that the provisions of Section 3 of Act No. 516, General Acts 1949, page 740, rather than the provisions of Section 5 of Title 36, Code of Alabama 1940, control the establishment of State speed zones.

Section 3, supra, provides as follows:

> "Whenever the Director of Public Safety and the Highway Director, with the approval of the Governor, shall determine upon the basis of an engineering and traffic investigation that any prima facie speed permitted by law is greater or less than is reasonable or safe under the conditions found to exist at any intersection or other place or upon any part of a highway, said directors may determine and, with the approval of the Governor, may declare a reasonable and safe prima facie speed limit thereat which shall be effective at all times or during hours of daylight or darkness or at such other times as may be determined when appropriate signs giving notice thereof are erected at such intersection or other place or part of the highway."

Section 5, supra, after fixing the speed limits on the highways of this State at a "careful and prudent speed not greater than is reasonable and proper," having due regard to the traffic, surface and width of the highway and any other conditions then existing, enumerates seven specific conditions under which the specified maximum speed limits shall prima facie be lawful. The conditions described include motor vehicles approaching railroad crossings, passing schools, traversing highway intersections, rounding curves, passing business districts, and passing residence districts. Section 5, supra, also fixes a maximum speed limit for motor trucks at forty miles per hour when operating outside of corporate limits, and at twenty miles per hour when operating inside of corporate limits.

In my judgment, there is no conflict between Sections 3 and 5, supra. Section 5 merely fixes certain prima facie speed limits which, under the driving conditions described, shall be lawful. Section 3, supra, vests in the Director of Public Safety and the Highway Director, with the approval of the Governor, the power and authority to change such prima facie lawful speed limits after they, by an engineering and traffic investigation, shall have determined that the prima facie lawful speed limits fixed by Section 5, supra, are greater or less than is reasonable or safe. Section 3, supra, therefore, provides for a necessary and desirable flexibility in the matter of such prima facie lawful speed limits. While the power and authority thereby granted is statewide, the Director of Public Safety and the Highway Director may decide, upon the basis of an engineering and traffic investigation, that the prima facie lawful speed limits need be changed only in certain localities, the limits prescribed by Section 5, supra, remaining in full force and effect elsewhere. For example, a prima facie lawful speed limit of fifteen miles per hour for some curves may be excessive for other curves. Hence, Section 3, supra, allows the limit to be fixed according to local needs.

2. Your second question is answered in the affirmative, subject to my clarification and discussion thereof below.

It cannot exactly be said that Section 3, supra, repeals Section 5, supra. While Section 3 clothes the Director of Public Safety and the Highway Director with the power and authority to set aside the prima facie lawful speed limits fixed by Section 5, supra, those limits remain in full force and effect unless and until new limits are fixed by the Director of Public Safety and the Highway Director, with the approval of the Governor. The effect of Section 3 is to give to those officials the power and authority to change all of the prima facie lawful speed limits fixed by Section 5, supra, to change only some of them, or to increase or decrease the limits of some, or of all, in particular localities. Therefore, the question of speed in any given locality, except within the corporate limits of cities and towns, is left entirely to the sound judgment and discretion of the Director of Public Safety and the Highway Director, with the approval of the Governor, after a proper traffic and engineering investigation has been made.

3. Your third question is answered in the negative.

Title 37, Section 649, Code of Alabama 1940, provides:

> "Except as otherwise provided in this Code, the several cities and towns in this state shall fix by ordinance the speed at which motor vehicles may be operated within their respective corporate limits, and shall fix the punishment for any violation of such ordinance within the limits of fine and imprisonment or either as now authorized or required by law."

Title 37, Section 650, Code of Alabama 1940, provides that any city or town passing any such ordinance as provided for by Section 649, supra, shall immediately post on each public highway leading into such city or town where the same enters such corporate limits a signboard on which shall be plainly and legibly written or printed the speed limit adopted.

Sections 649 and 650, supra, vest in incorporated cities and towns exclusive power and authority to regulate the speed of motor vehicles within their corporate limits. I find no conflict between those sections and Sections 3 and 5, supra, which, in my judgment, when speaking of "residence districts" and "business districts" refer to residence and business districts located outside of incorporated cities and towns. Hence, I do not construe Section 3, supra, as having deprived incorporated cities and towns of the power and authority to continue to fix their own speed limits pursuant to the authority given them by Sections 649 and 650, supra.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 26, 1950.

Hon. Ward W. McFarland,
State Highway Director,
CAPITOL.

Highways and Highway Department—Farm to Market Roads —Counties.

1. Act No. 329, General Acts 1943, page 311, known as the "Farm to Market Road Act of 1943," and amendments thereto, contemplate that the State match the county's participation in the construction of Farm to Market roads.

2. The cost of the construction of a bridge on the line of two counties built at the joint expense of said counties is borne in proportion to the taxable property in each county under Title 23, Section 50, Code of Alabama 1940.

3. The State Highway Department in providing for one-half the cost of a bridge on the line of two counties on a Farm to Market Road project should charge this cost to the State-County Aid Fund of the respective counties in proportion to the amounts each county expends in the construction of said bridge.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of March 6, 1950, is as follows:

"Re: State Participation in Cost of Bridge between two Counties.

"This Department is being asked to enter into an agreement with Dallas and Perry Counties for the construction of a bridge across Oakmulgee Creek, said creek being the boundary line between the two counties at the point where the bridge is to be located. This bridge is to be built as a SACP (State Aid County Propect) bridge with the state furnishing fifty per-cent of the cost of construction from its State County Aid fund established by the Farm-to-Market Road Act of 1943. Under the terms of this act one-sixty seventh of the funds accruing to the State County Aid fund are available to each county for matching purposes for the construction of county roads and bridges.

"Dallas and Perry Counties will provide one-half of the cost of construction not furnished by the state. The estimated cost of this bridge is about $50,000.00, of which from the half provided by the two counties approximately $20,000.00 would be furnished by Dallas County and $5,000.00 by Perry County, in accord with Section 50 of Title 23 of the Alabama Code. This section provides that the cost of

building bridges which connected two counties shall be borne by the respective counties in proportion to the amount of taxable property in each county.

"Your official opinion is requested as to whether this Department in providing for half of the cost of this bridge should charge this cost to the State Aid fund of the respective counties in proportion to the amounts each county is required to provide under the terms of Section 50, Title 23, mentioned above. The point raised by Dallas County (which would bear the heavy end of the load if Section 50 is applicable) is that this section should not apply unless the funds involved are derived from ad valorem taxes. The SACP fund is derived entirely from the state gasoline Excise Tax and the divisions of this fund to the counties is made independent of the assessed property valuation of any county in the state.

"The percentage of the state participation which is to be charged to the County Aid fund of the respective counties is immaterial to this Department since it does not in any way affect the total amount of state participation in such a project. However, it is of considerable importance to these counties in that it affects the amount of their balance which will remain to their credit in the State County Aid fund. It is expected that similar cases affecting the question raised here will arise in the future, and, therefore, your official opinion as to the applicability of Section 50 is hereby requested."

In answer to your inquiry, it is my opinion that your department, in providing for one-half the cost of the bridge in question, should charge this cost to the State County Aid Fund of the respective counties in proportion to the amounts each county is required to provide under the terms of Title 23, Section 50, Code of Alabama 1940, siz., approximately $20,000 to Dallas County and approximately $5,000 to Perry County.

Act No. 329, General Acts 1943, page 311, known as the "Farm to Market Road Act of 1943," provided for State aid in the construction of so-called farm to market roads. Certain sections of this act have been amended by Act No. 41, General Acts 1945, page 47; Act No. 440, General Acts 1947, page 319; Act No. 441, General Acts 1947, page 321; and Act No. 235, General Acts 1949, page 338.

The original act, and the amendments thereto, contemplate that the State match the amount of the county's participation in the construction of such roads. Section 4 of Act No. 41, General Acts 1945, supra, which amended Section 5 of the original act, provides in pertinent part as follows:

". . . All payments so made by the county shall be used or matched with an equal amount to be paid upon order of the State Highway Department out of the Public Road and Bridge Fund into the State County Aid Fund, as hereinabove provided, for the purpose of constructing county roads, upon arrival of the application therefor and

the plans and specifications thereof, as hereinabove provided; it being the intent of this Act that the State Highway Department and the county equally as nearly as practicable bear and pay the costs of construction, as hereinafter defined, of such roads; provided, however, that not more than one sixty-seventh part of the funds paid into the State County Aid fund by the Highway Department, may be expended for matching county funds in any one county in any one fiscal year..."

I am unable to find any specific provision of the Farm to Market Road Act of 1943, as amended, which would cover a situation like the one presented in your letter of inquiry. It is, therefore, necessary to look to other provisions of the general law to find a solution to your question.

Sections 50, 51, and 52, of Title 23, Code of Alabama 1940, are the only provisions of our general law relative to the payment of the costs of bridges erected on the line of two counties built at the joint expense of the counties. Section 50 provides as follows:

"§50. Bridges, ferries, or causeways, on the line of two counties built at joint expense.—Whenever a bridge, ferry or causeway is necessary on the line between two counties and the work is too great to be done by the overseers, the same must be built at the joint expense of such counties, in proportion to the amount of taxable property in each; and when the cost of building any county line bridges is so great that it cannot be paid by the counties which such stream divides, which fact may be determined by the court of county commissioners or like governing body of either county, such counties, or either of them, may make such contracts and incur such debts as may be necessary within constitutional limits, to procure for the use of such counties, or either of them, or the inhabitants thereof, the free use of a thoroughfare for vehicles and foot passengers over or across any bridge that may be built by any person, firm, or corporation over any stream forming the dividing line between such counties, and to pay any debt that may be thereby incurred any county may issue its bonds when such issue is authorized by vote as required by law. A county line bridge or ferry in the meaning of this section, shall be construed to be a bridge or ferry across a stream or slough between two counties whether the actual dividing line between said counties runs on either bank, or in the center of said stream or slough. If a toll bridge, ferry or causeway is in operation on any such line, the same may be purchased by either county alone or at the joint expense of the counties connected thereby in proportion to the taxable property in each."

Under the provisions of Section 50, supra, it appears that the expense of such a bridge as the one under consideration should be borne in proportion to the taxable property in each county. If said bridge was to be built jointly by Dallas and Perry Counties without regard to the Farm to Market Road Act of 1943, as amended, this section would apply.

I do not think the Farm to Market Road Act of 1943, as amended, would affect the amounts that Dallas and Perry Counties would expend

in constructing the bridge under consideration. It is purely a matching act in that the State matches the amount expended by each respective county. Therefore, if Dallas County expends $20,000 its account should be charged with this amount, and likewise, if Perry County expends $5,000 its account should be so charged with that amount. The fact that the moneys used by the State in matching is derived from the gasoline fund does not, in my judgment, affect this conclusion.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 26, 1950.

Dr. D. G. Gill,
State Health Officer,
State Health Department,
CAPITOL.

Health and Health Department—Municipalities.

Fruits and vegetables are properly classified as "food" within the meaning of regulations governing the display of food.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion bearing date of January 6, 1950, is as follows:

"I quote as follows from letter received from one of our county health officers:

" 'The City of Selma, through its Planning Committee, is very much interested in clearing the streets of the ordinary fruit stands and carts or wagons. They have an ordinance recently passed not allowing the sale of produce on the streets of the city but we have one merchant who persists in displaying his fruits on the face of and within the entrance of his building that is neither under or properly screened.

" 'We have sufficient legislation under the State regulations governing the display of food which will meet this situation and I am very anxious to get a ruling as early as possible from the Attorney General as to whether or not fruits and vegetables can be classified as food.'

"It will be appreciated if you will give me your opinion as to whether fruits and vegetables can be classified as food."

Your question is answered in the affirmative.

When used in regulatory statutes the term "food" is used in its broad and general sense. It applies to all that is eaten for the nourishment of the body, including any substance that is taken into the body, which serves, through organic action, to build up the normal tissues or to supply the waste of tissue. Thus, food is nutritive material taken into the body for the purpose of growth, repair, or maintenance. **Corum vs. R. J. Reynolds Tobacco Co.,** 205 N. C. 213, 171 S. E. 78; **Liggett and Myers Tobacco Co. vs. Cannon,** 132 Tenn. 419, 178 S. W. 1009, L. R. A. 1916, A, 940, Ann. Cas. 1917A, 179; 22 Am. Jur., Food, Section 2, page 804; 36 C. J. S., Food, Section 1, page 1041; 17 A. L. R. 1282, note.

A variety of edibles intended for human consumption is embraced by the term "food," as used in such regulatory statute. While no decision is found involving fruits and vegetables specifically, it seems likely that the absence of authority can be laid to the fact that no litigant seriously has contended that fruits and vegetables are not "food" suitable and intended for human consumption. The conclusion that fruits and vegetables are food, within the meaning of a regulatory statute, is expressed by **obiter dicta** in **Ferch v. People,** 101 Colo. 471, 74 Pac. 2d 712. Any other conclusion would exclude from the protection of inspection laws a large bulk of our daily food consumption.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 29, 1950.

Hon. Ed E. Reid,
Executive Director,
The Alabama League of Municipalities,
Fourteen South Hull Street,
Montgomery, Alabama.

Sales Tax—Municipalities—Contractors.

A contractor is liable to the vendor for the State sales tax on material that goes into a municipal improvement project done under contract by the contractor.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion bearing date of May 5, 1950, is as follows:

"I have been advised by the Mayor of one of our cities that the State Department of Revenue has called upon a contractor who did some street improvement work in the city on a contract basis for the payment of State sales tax on the materials used in the job performed

for the municipality. This Mayor, knowing that the municipalities are exempt from the payment of State sales tax on purchases made by the municipalities, felt that since we are expressly exempt from payment of the tax on purchases directly made that jobs performed for municipalities would be exempt from State sales tax payments, otherwise we would be indirectly paying the tax because unquestionably if material in jobs of this sort are taxable, such taxes will be added to the contract bid submitted the city.

"I wish you would advise us if a contractor is liable for the State sales tax on material that goes into a municipal improvement project done under contract by the contractor."

In order to answer your inquiry as to whether a contractor is liable for the State sales tax on material that goes into a municipal improvement, I invite your attention to Title 51, Section 752(j), Code of Alabama 1940, as amended, which defines the term "sale at retail" or "retail sale" in the following language:

"(j) The term 'sale at retail' or 'retail sale' shall mean all sales of tangible personal property except those above defined as wholesale sales. The quantities of goods sold or prices at which sold, are immaterial in determining whether or not a sale is at retail. **Sales of building materials to contractors, builders or landowners for resale or use in the form of real estate are retail sales in whatever quantity sold. Sales of tangible personal property or products to manufacturers, quarry operators, mine operators or compounders, which are used or consumed by them in manufacturing, mining quarrying or compounding and do not become an ingredient or component part of the tangible personal property manufactcred or compounded are retail sales.**" (Emphasis supplied.)

It follows that Title 51, Section 755(b), Code of Alabama 1940, as amended, which exempts incorporated municipalities from the sales tax on gross proceeds of sales of tangible personal property, has no application insofar as sales to a contractor are concerned. This is true regardless of the fact that the material of such sale is to be used in construction work for a municipality. When tangible personal property is sold by a vendor to a contractor and said personal property is used by him in the construction of a project, such tangible personal property becomes, by its use, real estate, and the title thereto passes into the landowner by operation of the contract. Such sale to the contractor is a retail sale and constitutes the incidence upon which the sales tax is based. In other words, such sale to the contractor is the ultimate sale, and the use of the material by the contractor in the performance of his contract does not constitute sale of the property by him to the landowner, but such property is used or consumed by him in the performance of his contract. **State of Alabama v. King and Boozer**, 314 U. S. 1, 86 L. Ed. 3; **Lone Star Cement Corp. v. State Tax Commission**, 234 Ala. 465, 175 So. 399; **Wood Preserving** Corp. v. State Tax Commission, 235 Ala. 438, 179 So. 254; Quarterly Report of Attorney General, Vol. 48, p. 56.

Therefore, it is my opinion that a contractor is liable to the vendor for the State sales tax on material that goes into a municipal improvement project done under a contract by a contractor and a municipality.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 30, 1950.

Hon. F. M. Shamblin,
Tax Assessor,
Tuscaloosa County,
Tuscaloosa, Alabama.

Boards of Equalization—Employers and Employees.

1. Clerical employees of the Board of Equalization may only be hired by the County Board of Equalization.

2. The County Tax Assessor serves as Secretary of the County Board of Equalization without compensation.

3. Employees of the Board of Equalization are paid in accord with the provisions of Title 51, Section 95, Code of Alabama 1940, as amended by Act No. 462, General Acts 1945, page 693.

Opinion by Assistant Attorney General Parker.

Dear Sir:

Your request for an official opinion, bearing date of January 27, 1950, is as follows:

"I would like to have your official opinion on the following:

"The law makes me the Official Secretary of the Board of Equalization.

"Is it my duty and responsibility to hire and fire as the case might be, the clerical assistance necessary to carry on this secretarial work for the Board of Equalization.

"Whose job is it to provide the necessary funds to pay for this work."

Clerical employees of the Board of Equalization may only be hired by the County Board of Equalization. Title 51, Section 95, Code of Alabama 1940, as amended by Act No. 462, General Acts 1945, page 693.

You will note that by Title 51, Section 93, Code of Alabama 1940, you as Secretary to the Board of Equalization serve in that capacity without compensation. There is no authority of law to employ a person to perform any of the duties of Secretary. Quarterly Report of Attorney General, Volume 20, page 196.

Clerical employees of the Board of Equalization are paid in accord with the provisions of Section 95, as amended, supra, which are, in pertinent part, as follows:

"Section 95. HOW COMPENSATION PAID.—The compensation of the members of the several county boards of equalization as provided for in the preceding section shall be paid one-third by the state, one-third by the county, and one-third by any municipality in the county in which the total assessed value of all taxable property is equal to or greater than fifty percent of the total assessed value of all taxable property located in the county. In those counties where there is no city in which the total assessed value of the taxable property is equal to or greater than fifty percent of the total taxable property of the county, then the compensation of the members of the county board of equalization, as provided in the preceding section shall be paid one-half by the state and one-half by the county. The county board of equalization of any county is hereby authorized and empowered to employ such appraisers, engineers, stenographers, clerks or assistants as may be necessary for the performance of the duties which may be required of said boards of equalization, subject however to all the provisions of any merit system law now or hereafter in effect in said county; and provided further that the number of persons to be employed by the board of equalization shall be subject to the approval of the county commission or like governing body, and the state commissioner of revenue and provided further that if the compensation of said employee is governed by the provisions of any merit system law in effect, that the provisions of said law shall govern, otherwise the compensation of said employee shall be fixed by the county commission or like governing body, subject to the approval of the commissioner of revenue, all such compensation to be paid in the same manner as the law providing for the payment of compensation to the members of the county board of equalization of said county. * * *"

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

May 30, 1950.

Hon. Thomas A. Peavey,
Judge of Probate,
Escambia County,
Brewton, Alabama.

Motor Vehicles—License—Automobile Dealers.

A dealer in tractor parts and accessories is required to purchase the license set forth in Title 51, Section 465, as amended.

Opinion by Assistant Attorney General Parker.

Dear Sir:

Your request for an official opinion, bearing date of April 20, 1950, is as follows:

"I have a Farm and Tractor Dealer in this county, that has purchased License for selling Tractors and Farm Implements.

"Now this is a question that has come up—Is he supposed to have a License to sell accessories? My opinion is, he does not and I refer you to Sec. 462 and 465 of License Schedules of Revenue Code.

"Will appreciate you making a special effort to have this expedited."

The question presented by your inquiry is does a person who is licensed as a tractor dealer under the provisions of Title 51, Section 605, as amended by Act No. 133, General Acts of Alabama 1947, page 42, approved July 18, 1947, have to purchase the license provided by Title 51, Section 465, as amended by Act No. 596, General Acts of Alabama 1939, page 966, approved June 28, 1940, in order to sell accessories.

Section 465, supra, as amended, reads, in pertinent part, as follows:

"* * * Each person selling motor vehicle accessories, including automobile radios, and,-or motor vehicle parts, and-or motor vehicle batteries, and-or tires, shall pay the following annual license: In cities of:

"Over 100,000 population	$40.00
25,000 to 100,000 population	30.00
5,000 to 25,000 population	20.00
2,000 to 5,000 population	10.00
All other places, whether incorporated or not	5.00

"Provided regularly licensed filling stations or garages are not required to pay the above accessories license if their stock of acces-

sories at any time does not exceed the wholesale value of Seventy-five dollars ($75.00).

"Approved June 28, 1940."

The term "vehicle" is different and broader than the word automobile, **City of Dayton v. DeBrossee,** 23 N. E. 2d 647, 62 Ohio App. 232, and includes farm tractors. Title 36, Section 1, Code of Alabama 1940; Quarterly Report of Attorney General, Volume 3, page 200; **State v. Cedar Grove Refining Company,** 152 So. 531, 178 La. 810; **State ex rel Rice v. Louisiana Oil Corporation,** 165 So. 423, 174 Miss. 585.

I, therefore, conclude that a dealer in tractor parts and accessories must have the license required by Section 465, supra, as amended.

Your attention is directed to the exemptions which are set forth in Title 51, Section 462, Code of Alabama 1940, as follows:

"* * * Upon the payment of the license prescribed in this section such dealer shall not be required to pay the license as provided in sections 465-467, 472, 474, 605 of this title."

Therefore, a licensee under Section 462, supra, would not be required to purchase either the license under Section 465, supra, or the license under Section 605, supra. But a licensee under Section 605, supra, would be required to purchase a license under Section 465, supra.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 1, 1950.

Hon. Kenneth Cooper,
Circuit Solicitor,
28th Judicial Circuit,
Baldwin County,

Bay Minette, Alabama.

Department of Conservation—Game and Fish—Inspection.

Since shrimp should be checked for size in the trawl, and not aboard the boat, licensed shrimp catchers having on board appreciable quantities of shrimp with heads which weigh less than forty to the pound, or headless shrimp weighing less than sixty-eight to the pound, are presumed to have the same in possession for sale for commercial purposes in violation of Title 8, Section 161, Code of Alabama 1940, as amended.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion bearing date of September 12, 1949 is as follows:

"Since the Department of Conservation opened the shrimping season August 8th, 1949, there have been a large number of arrests in Baldwin County shrimpers for violation of Section 161, Title 8, Code of Alabama 1940, as amended by the 1947 Cum. Supp. thereto. This Section 161, reads in part as follows:

" 'It shall be unlawful for any person, firm, corporation or association to . . . have in possession for sale for commercial purposes any shrimp where it requires more than forty with heads to weigh one pound . . .'

"The balance of the Section quoted is undisputed, and needs no further comments.

"The facts in the several cases are undisputed by either the shrimpers or the representatives of the Department of Conservation. Briefly, they are as follows:

"All defendants, eleven in number when caught by duly appointed inspectors of the Department of Conservation, had in their possession shrimp that ran in count from forty-five to the pound, upwards. None of the shrimpers had culled the shrimp which were found on the deck of their boats by the inspectors. (Culling means to take out all small shrimp and fish found in the catch when it is dumped on the boat.)

"Since all citations, or arrests, were made under a similar set of circumstances, it was agreed between attorney for the shrimpers and myself, that only one case would be tried before the Justice of the Peace, and the remaining cases would stand or fall on the same ruling.

"After hearing the facts in the case, the Justice of the Peace ruled that the one defendant being tried was guilty of violation of Section 161, Title 8, Code of Alabama 1940. In the case tried the count ran forty-seven to the pound.

"The ruling by the Justice of the Peace was based on the proposition that when shrimp are placed out of the net on the deck of the boat they are 'in possession for sale for commercial purposes.' This also is the interpretation given, I am informed, by the legal section of the Department of Conservation.

"It is contended by the shrimpers that the seafood inspectors from the Department of Conservation should not make the count

until after the shrimp have been culled. They allege this has always been the custom until this year. Furthermore, they point out that Section 131, Title 8, Code of Alabama 1940, directs that oysters **must** be culled, and those less than three inches in length must be 'immediately replaced . . . upon the natural reefs or beds from which they are taken,' and why not the same procedure for the shrimpers— that it most likely was an oversight on the part of the legislature when the shrimping law was written. Thirdly, the shrimpers point out that there is no prescribed size for the trawls used in catching the shrimp, as is in the case for catching fish in salt waters. It is impossible to know the size of the shrimp until after the net is brought to the boat; therefore, say the shrimpers, 'why not permit us to cull the small shrimp on the boat and return them to the water, and keep all those that meet the legal size requirements?'

"To these arguments advanced by the shrimpers the Department of Conservation replies that in the absence of specific mention of the right to cull the shrimp, it must be presumed that the legislature did not intend that they be culled. Instead of culling, under the Department of Conservation's interpretation samples are taken from the net when hauled alongside the boat, or before the contents are emptied on the deck. If the count is greater than forty to the pound the whole catch must be returned to the water, without being emptied on deck. Unless it is handled in this manner, the Department of Conservation representatives contend that the shrimpers would continue to troll where there are concentrations of small shrimp which are found in some areas all seasons of the year. (This, the shrimpers contend, would be a waste of seafood, and ruinous to the live shrimp remaining in the water—for 75% to 90% of the shrimp are already dead before the trawls are raised out of the water. The seafood inspectors say however, that the 10% to 25% remaining live shrimp must be saved, and that if the net was opened on deck most of the remaining live shrimp would be killed.) Furthermore, the Department of Conservation contends that the shrimp, when placed on deck, 'are for sale for commercial purposes' because each boat has been issued a shrimp catcher's license as provided by Section 155, Title 8, Code of Alabama 1940.

"Request you advise this office (1) whether the inspectors from the Department of Conservation are correct in denying the shrimpers the right to cull their catch before inspection, as is done in the case of oysters, and (2) if the shrimpers should have the right to cull their shrimp before inspections by the seafood inspectors, when should the inspections be made, while on the boat, or when the boat docks and the shrimp are taken off and put in the fish house for sale to the public?"

I am of the opinion that the Shrimp Size Law denies the shrimpers the right to cull after their catch has been removed from the trawl and dumped aboard the boat.

Title 8, Section 161, Code of Alabama 1940, as amended by Act No. 49, General Acts 1947, page 16, provides:

> "It shall be unlawful for any person, firm, corporation or association to sell, offer for sale, or have in possession for sale for commercial purposes any shrimp where it requires more than forty with heads to weigh one pound, or where it requires more than sixty-eight headless shrimp to weigh a pound. This law shall apply to shrimp taken from the territorial waters of Alabama or brought into Alabama from waters beyond the territorial jurisdiction of Alabama. Nothing in this section shall be construed to apply to shrimp which are used solely as bait. Shrimp used solely as bait shall be controlled by regulation duly promulgated by the director of conservation."

Legislative intent underlying enactment of the Seafood Laws was the protection, propagation and conservation of all seafoods existing or living in the waters of Alabama. Title 8, Section 4, Code of Alabama 1940. The obvious purpose of Section 161, supra, prescribing a minimum shrimp weight requirement, is to prevent an untimely depletion and certain ruinage of the State's natural shrimp resources, a certain result if young shrimp are not afforded their normal opportunity for growth. The State is fortunate indeed in possessing this bounty; its protection for the use and enjoyment of the present and future generations is assured only by conservation laws wisely enacted and prudently applied.

It is common knowledge, confirmed by the testimony of shrimpers themselves, that the viability of shrimp, unlike that of oysters, is extremely precarious once shrimp have been removed from their natural waters. In fact, it seems undisputed that a high percentage, if not all, of a catch is either dead or fatally wounded upon being landed on the deck of a boat. Water pressure in the net, the length of the drag, and the fact that the drag usually is made in heavy mud are factors contributing to the large fatality percentage of any catch. Any attempt to assort, classify or cull them for size is useless and vain procedure once a high percentage of the catch is dead. While true that a certain percentage of the catch of any trawl is dead when the trawl is brought to the surface, it cannot successfully be denied that the prospects for viability are lessened in direct proportion to the length of time the trawl remains out of water, the distance to which the catch is transported after being removed from the water, and the amount of handling involved in its removal.

Commercial shrimpers generally know these facts. They know also that constant poaching of young shrimp by a minority will deplete the shrimp reserves of the majority and that this seafood delicacy, a staple for many, may be exhausted by indiscriminate shrimping methods. Careful shrimpers therefore commonly run a "try drag," for the two-fold purpose of determining whether the waters tested contain shrimp and whether such shrimp meet legal weight requirements. The "try drag" can be run with a small trawl or with the regular trawl with which the boat is licensed to fish. If the regular trawl be used the careful and prudent shrimper, anxious to observe the law, runs this test drag only

for a short period of time, perhaps five or ten minutes. If the length and size of his drag is such as to be in reckless disregard of existing conditions and the probabilities of catching more under-sized shrimp than is necessary in making a test check for size, he runs such a drag at his peril and subject to the likelihood of being found in possession of a suspiciously large quantity of under-sized shrimp. Should this drag not reveal shrimp in sufficient quantity or should it reveal a majority of under-sized shrimp, such a shrimper moves on and hunts in other waters. Which is to say, the shrimper knows, or should know, before he runs his regular drag whether his catch will consist of legal size shrimp. Moreover, the area being fished has some bearing on size, since the smaller shrimp are generally found closer to shore and farther north in Mobile Bay. The season also has an important bearing on size. While in theory the shrimping season is not officially opened by the Director of Conservation until, in his judgment, a majority of the shrimp have reached legal size, it should be emphasized that his opening of the season does not invest shrimpers with lawful authority to have under-sized shrimp "in possession for sale for commercial purposes." The season is always closed on shrimp which do not meet the legal weight requirements prescribed by Section 161, supra.

It follows that a shrimper, found with an appreciable quantity of under-sized shrimp aboard, should not be allowed to assert, as justification, that he intended to cull aboard and return under-sized shrimp to the water. A majority of his catch is by this time dead; to return dead shrimp to the water would be an obvious waste of edible seafood and, in a sense, would be to compound his original offense, which consisted of catching in appreciable quantities, and thereby killing under-sized shrimp. I find no logic whatsoever in culling dead shrimp. The answer to the argument that most of the shrimp are killed in the trawl by the drag itself is that if a "try drag" is run, with either a small trawl or with the regular trawl for a short period of time, only a few pounds are caught and seafood enforcement officers know that it is impossible to run test drags without catching, at intervals, under-sized shrimp. Hence, when that type of rig is used which necessitates landing the catch aboard before the catch can be checked for size, the mere possession of a small quantity of under-sized shrimp, landed aboard in making a "try drag" would not, in my judgment, be in violation of the law.

Whether under-sized shrimp found aboard are lawfully there as the result of a lawful "try drag," or there as the fruits of a purposeful intent to evade the law by subterfuge, would be questions of fact to be established in each individual case, in which the quantity aboard would have strong evidentiary value. Suppose, for example, that a shrimp boat is found with two or three barrels of under-sized shrimp iced and stowed away below deck, would not a jury be justified in finding that the shrimper had such illegal shrimp "in possession for sale for commercial purposes?" Shrimp aboard the boat are just as much "in possession" as shrimp on the dock. Whether the shrimper intends to offer them for sale for commercial purposes is a question of fact to be decided under all the surrounding facts and circumstances. In view of the established shrimping methods, it must be assumed that shrimpers can, within rea-

sonable limits, regulate the size of shrimp impounded in their nets and that commercial shrimpers fish for a living, and not for charity, and that ordinarily they have their catch in possession for the purpose of sale.

While true that most shrimpers, in view of the penalties prescribed for violation of Section 161, supra, would cull their catch before coming ashore, the evil which the statute was intended to rectify was the catching in appreciable quantities of under-sized shrimp—and by "catching" I refer to impounding excessive quantities of under-sized shrimp in the trawl, either through carelessness or purposeful intent, because of failure to run a proper "try drag." Therefore, I construe Section 161, supra, as requiring the shrimper to check the size of his catch while in the trawl and as necessitating proper "try drags" in order to check the size of the shrimp inhabiting the particular waters. I find within the framework of the statute no justification for neglect or refusal to run "try drags," nor in the careless use of such drags as a subterfuge for catching under-sized shrimp and selling them if undetected by enforcement officers. Under-sized shrimp can in no event be offered for sale, but can be given to charity or used for personal consumption.

I regard as specious the argument that a shrimper's unlawful intent is not evidenced until he docks with his illegal catch and offers it for sale. So strict a construction would negative all practical enforcement of the purpose and intent of Section 161, supra. Many shrimpers in the Mobile Bay Area sell their catch direct to so-called "freight boats," or refrigerated boats, out in the bay and without ever landing their catch ashore.

I find no analogy between Section 161, supra, and Title 8, Section 131, Code of Alabama 1940, requiring that oysters be culled upon their natural reefs or beds as taken. As respects viability, oysters afford no suitable basis for comparison. It is commonly known that oysters can remain alive out of water considerably longer than shrimp and can be returned to their beds alive after being culled.

I am therefore of the opinion, as indicated above, that where shrimpers licensed as commercial shrimp catchers under Title 8, Section 155, Code of Alabama 1940, have on board, and out of the trawl, excessive quantities of shrimp with heads which weigh less than forty to the pound, or headless shrimp weighing less than sixty-eight to the pound, they are presumed to have such shrimp "in possession for sale for commercial purposes," in voilation of Section 161, supra. If the quantity of under-sized shrimp aboard is not appreciable nor greater than what reasonably would be expected to be caught by careful and prudent "try drags," no such presumption arises. Thus, the quantity aboard is of special significance. I am advised that, for enforcement purposes, seafood officers generally assume that, where under-sized shrimp total less than 10% of all shrimp aboard, such 10% was necessarily caught in running proper "try drags" and not as the result of the shrimper's purposeful intent to evade the law. Whether such under-sized shrimp be dead or alive is not material. See **Commonwealth v. Hodgkins,** 170 Mass.

197, 49 N. E. 97. This conclusion having been reached, your second question is moot.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 5, 1950.

Mr. Jerome Phillips,
Secretary, Executive Committee,
State Training School for Girls,
Box 38, East Lake,
Birmingham, Alabama.

State Training School for Girls.

The Executive Committee and the Superintendent of the State Training School for Girls may not dispose of old property and acquire new property unless such powers of disposition and acquisition have been delegated to them by the Board of Trustees of said school.

Opinion by Assistant Attorney General Metcalf.

Dear Sir:

Your request for an official opinion, bearing date of February 14, 1950, is as follows:

"There is at the State Training School for Girls one old non-useable Chevrolet automobile which has been discarded for several years and which automobile has been left out in the weather all of that time.

"There is also an old motorcycle belonging to the State, at the State Training School for Girls, which said motorcycle has not been used for years and which serves no purpose whatsoever at the school and has been exposed to the weather for several years.

"There is also an expensive tractor which is impractical for use in connection with the school and which was used only one day during the year 1949. There are also a few other items of machinery and equipment located at the school which are of no use or value to the school at all.

"Please furnish me with your official opinion as to whether or not the Superintendent of the school together with the Executive Committee of the school may dispose of the above described property in such manner as the Superintendent and the Executive Committee deems most advantageous to the school. I am of the opinion that the Superintendent of the school, together with the Executive Committee

can trade in the above mentioned tractor on some machinery that is sorely needed at the school.

"Please furnish me with your official opinion concerning the above property at your earliest convenience."

Title 52, Sections 571 and 572, Code of Alabama 1940, provide for a board of trustees, an executive committee, and a superintendent for the State Training School for Girls, and prescribe the powers and duties of each. Neither the executive committee nor the superintendent is given specific power to dispose of old equipment belonging to the school and replace it with new equipment without the consent of the Board of Trustees.

Title 52, Section 571(10), Code of Alabama 1940, states:

"(10) The board shall have supervision of the land and buildings of the school; they shall take charge of the general interests of the institutions; they shall see that its affairs are conducted according to law and to such rules and regulations as the board may have adopted, or may hereafter adopt, and that discipline is maintained in the institution. They shall exercise a vigilant supervision over the institution, its officers and inmates, and prescribe the duties of the officers not inconsistent with the provisions of law."

Title 52, Section 571(12), Code of Alabama 1940, states:

"(12) The board is empowered to control and direct the expenditure of all appropriations or other funds which may be made for the maintenance and activities of the institution and to do and perform such other acts and things as may be necessary to carry out the true intents and purposes of this chapter."

Title 52, Section 571(15), Code of Alabama 1940, states:

"(15) * * * The executive committee shall hold monthly meetings and do and perform such duties as may be delegated to it by the board of trustees at any regular meeting. The board is hereby empowered to delegate to the executive committee such powers as it may desire."

Title 52, Section 572(7), Code of Alabama 1940, states:

"(7) The superintendent shall have charge of all the property of the institution under the direction of the trustees. She shall keep ac counts of all receipts and expenditures and of all property intrusted to her showing the income and the expenses of the institution and shall account to the trustees in such manner as they may require for all money received and disbursed by her. Her books and all documents relative to the school shall at all times be open to the inspection of the trustees."

In view of the above provisions, it is my conclusion that the board of trustees has complete control of the disposition and acquisition of property.

In regard to the expenditures, the executive committee and the superintendent have only those powers which have been delegated to them by the board.

The board of trustees does have the power to dispose of such machinery as you write of in your letter and acquire new machinery necessary for the operation of the school. Your inquiry does not indicate whether the board has delegated this power to the executive committee, as it may do under Section 571(15), supra, or has directed the superintendent to do such acts, as it may do under Section 572(7), supra.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 5, 1950.

Hon. J. L. Killian, Sr.,
Judge of Probate,
Lee County,
Opelika, Alabama.

Tax Deed—Certificate of Purchase.

The judge of probate is not authorized under Title 51, Section 276, Code of Alabama 1940, to execute a deed either to the decedent's heirs, legatees, or devisees, or to his personal representative, in absence of an assignment of the certificate of purchase by endorsement on the certificate or by other writing purporting to be an assignment of this particular certificate.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of May 13, 1950, is as follows:

"I am writing to inquire if the Probate Judge of Lee County, Alabama, has authority to now execute and deliver a tax deed under the following circumstances:

"On June 26, 1939, thirty (30) acres of land, assessed in the name of W. G. Black, was sold at a tax sale to Clifton A. Jones, for delinquent 1938 taxes.

"Section 276 of Title 1 of the Alabama Code of 1940 provides:

" '276. Deed delivered to purchaser.—After the expiration of three years from the date of the sale of any real estate for taxes, the judge of probate then in office must execute and deliver to the purchaser

other than the state, or person to whom the certificate of purchase has been assigned, upon the return of the certificate and payment of a fee of one dollar to the judge of probate, a deed to each lot or parcel of real estate sold to the purchaser and remaining unredeemed, including therein, if desired by the purchaser, any number of parcels, or lots purchased by him at such sale; and such deed shall convey to and vest in the grantee all the right, title, interest, and estate of the person whose duty it was to pay the taxes on such real estate, and the lien and claim of the state and county thereto, but it shall not convey the right, title or interest of any reversioner of remainderman therein.'

"You will note from this Section that the deed is to be issued to the purchaser or other person **to whom the Certificate of Purchase has been assigned.**

"The Certificate of Purchase was presented to me on May 9, 1950, for a tax deed, the certificate being in the name of the purchaser, Clifton A. Jones. There was no assignment, either on the Certificate itself or by separate instrument. However, the will of Clifton A. Jones devising all of his property to the holder of the Certificate (Marie Robelot Garrett) may, under the statute, be construed as an assignment of the Tax Certificate.

"There are annotated under Title 276, Sec. 51, of the Alabama Code of 1940, several opinions of your office on this question, the last being your opinion contained in Reports January-March, 1943, page 50. This last opinion from your office held that where the purchaser died **before** the expiration of the three year period without assigning the Certificate of Sale, the Judge of Probate was not authorized to execute a deed to either the decedent's heirs, legatees or devisees, or to his personal representative.

"However, the facts in the instant case are different in that Clifton A. Jones died after the expiration of the three year period of redemption. The tax certificate is dated January 26, 1939. Clifton A. Jones died on the **12th** day of **November** 1943, leaving a will duly probated, by which he devised all of his real property to the holder of the Certificate, Mrs. Marie Robelot Garrett, she being the person who has presented the Certificate to this office for a tax deed.

"Would not this will operate as an assignment of the Tax Certificate by the decedent, Clifton A. Jones, to Mrs. Garrett?

"My question is: Under the facts hereinabove set out, am I authorized to execute a tax deed to Mrs. Garrett, the holder of the Tax Certificate?"

The answer to your question must be in the negative. You are not authorized to execute a tax deed to the present holder of the tax certificate.

The authority of the probate judge in connection with tax sales and tax deeds is purely statutory and must be strictly pursued, and the deed issued only to those to whom he is authorized by law to execute it. **Alexander v. Savage,** 90 Ala. 383, 8 So. 93; **Pollak v. Milan,** 190 Ala. 569, 67 So. 381.

In the sale of land for taxes, great strictness is required, and every provision of the statute must be punctiliously pursued. **Pollak v. Milam,** supra; **Morris v. Card,** 223 Ala. 254, 135 So. 340.

Title 51, Section 270, Code of Alabama 1940, provides for assignment of the certificate, "in writing or by endorsement." The assignee to be entitled to a deed, however, must be such an assignee as is contemplated by the statute; the assignment to be availing must have been made by the purchaser himself "by endorsement" of the certificate, or otherwise in writing. That is the only sort of assignment, under the rule of strict construction and strict compliance, that the probate judge is authorized to accept or recognize in performance of the purely ministerial duty imposed upon him by statute to execute the tax deed. See Quarterly Report of Attorney General, Volume 30, page 52.

Your attention is called to the words of the Court in **Alexander v. Savage,** supra, as follows:

> "Under this state of facts, the deed was clearly void for the want of authority in the probate judge to execute it to the administrators of the deceased purchaser. As grantor, this officer was acting under a limited statutory power. A tax deed made to one substituted for the purchaser, or to any grantee other than one sanctioned by the statute, is void. The statutory authority to convey must be strictly pursued by the probate judge, and the deed made only to those to whom he is authorized by law to execute it."

Your attention is also called to the syllabus to the opinion of this office, cited above (Quarterly Report of Attorney General, Volume 30, page 52), as follows:

> "Where the purchaser at tax sale died before expiration of the period for redemption without assigning his certificate of purchase by endorsement or otherwise in writing the judge of probate is not authorized under Code 1940, Title 51, Section 276 to execute a deed either to the decedent's heirs, legatees, or devisees, or to his personal representative."

The holding in this case of **Alexander v. Savage,** supra, is to the effect that this purely statutory right of the purchaser at a tax sale is not such property as will pass by descent and distribution. This being the case, it will not pass by will. A decedent cannot by will pass the title of property to a legatee which would not pass by descent without a will. **Carter v. First National Bank of Opp,** 237 Ala. 47, 185 Eo. 361.

In view of these authorities, it is felt that the assignment contemplated by the statute is either "by endorsement" of the certificate, or other writing purporting to be an assignment of this particular certificate. The purely statutory right created by the certificate is not such as will pass by will under the classification of property.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 8, 1950.

Dr. A. R. Meadows,
State Superintendent of Education,
Department of Education,
Montgomery 4, Alabama.

Schools—Municipalities—Funds—County Boards of Education.

The City of Auburn may contract for the construction of school building facilities to be located on a school site in the city, the title to which is in the State of Alabama, and the control of which is in the County Board of Education of Lee County.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of January 4, 1950, is as follows:

> "The town of Auburn, Alabama, has provided proceeds from taxes to be used for constructing school building facilities within the incorporated limits of the City of Auburn for children attending the public elementary and high school grades in the city. The city schools in Auburn are under the administration of the Lee County Board of Education. The school site on which the city wishes to construct school building facilities is deeded to the State for school purposes.
>
> "Can the city contract for the construction of school building facilities to be located on the school site that is not owned by the city but is owned by the State? Your answer to this question will be appreciated."

In answer to your inquiry, your attention is called to the case of **Carey v. City of Haleyville**, 230 Ala. 401, 161 So. 496. In this case it was held that the City of Haleyville had authority to issue bonds to pay one-half of the cost of a school building to be erected in the city and to be opened to the pupils from the entire school district of which the city was a part, notwithstanding that the city would not have title to the school, and that it would be controlled by the county board of education. The court, among other things, said:

"True, the municipality may not have title to the school building, and it may be under the control of the county board (Gen. Acts, Ex. Sess. 1933, p. 81, amending School Code 1927, § 132), and the affairs of the school be under like control. School Code 1927, § 86. But considerations of this character would deny to the municipal corporation the power to donate any funds to the betterment of the schools located therein, as its public schools, by reason of the population limitation of 2,500 are under the supervision of the county board. Yet the inhabitants of Haleyville receive the benefit and enjoy the privileges of these schools in their midst; and the mere fact that another and independent agency of the state controls their affairs is no reason for a denial of the right of the citizens through their municipal authorities lending aid in support of such institutions.

" * * * * *

"No sound reason appears why such municipalities may not devote surplus proceeds of revenue for the erection or maintenance of such schools located within their corporate limits. The inhabitants receive the benefits, though along with others in territory surrounding."

In the case of **State, ex rel. Austin v. City of Mobile**, 248 Ala. 467, 28 So. 2d 177, the court held that the City of Mobile could legally pay $350,000.00 out of its current funds to the State of Alabama, Department of Docks and Terminals, to aid in the department's expansion of the State Docks in Mobile, notwithstanding that title to the docks would not be in the city. In this case, after approving the holding of the **Carey v. City of Haleyville** case, supra, the court said:

"The holding in Carey v. City of Haleyville, supra, was approved in the case of First Nat'l. Bank of Birmingham v. Walker County Board of Education, 243 Ala. 576, 11 So. 2d 297, 299. In this case the question arose in an action for mandamus whether the Town of Cordova had the right to donate certain funds to the county for the erection and maintenance of a school building in the Town of Cordova, which building and lot had been conveyed to the Walker County Board of Education. This court said, 'The town had the legal right to make the donation without exacting any obligation to return it.' "

The **City of Mobile** case, supra, affirmed an opinion of this office rendered under date of October 11, 1946, and found in Quarterly Report of Attorney General, Vol. 45, page 5. Cf. Quarterly Report of Attorney General, Vol. 52, page 53; Vol. 52, page 141; Vol. 55, page 111.

In view of the above authorities, it is my opinion that the City of Auburn may contract for the construction of school building facilities to be located on a school site in the city, the title to which is in the State of Alabama, and the control of which is in the County Board of Education of Lee County.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 8, 1950.

Hon. H. M. Brittain,
Judge of Probate,
Randolph County,
Wedowee, Alabama.

Elections—Absentee Ballots—Registers.

When two or more elections are held on the same day (other than municipal elections held at a time different from a primary or general election), as in the instant case, a primary election and a special county school tax election, the register, or person acting in his stead, is not entitled to the compensation provided by Section 17 of Act No. 424, General Acts 1949, page 601, for his services in handling the absentee ballots for each of the two elections.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of May 31, 1950, is as follows:

"Mr. J. B. Traylor, the Register in Chancery, has filed a claim against the county for handling absentee ballots in the primary election of May 2nd and also for handling absentee ballots for a special county school tax election which was held on the same date, May 2, and handled in the same office and by the same person.

"Please give me your opinion as to whether or not the claim for handling the special school tax election is an additional claim which the county can legally pay for the services as outlined above."

The law applicable to absentee voting is Act No. 424, General Acts 1949, page 601. It is provided in Section 1 of this Act that it "shall apply to all primary, general, special, and municipal elections held in the State of Alabama."

The register in chancery in each county is designated by this Act to handle absentee ballots in any election held in this State, to which the Act pertains, other than any municipal election that is held at a time different from a primary or general election, with provision for the designation of a person to serve in his stead, in the event he is a candidate for any office in the election.

The compensation of the register, or person acting in his stead, for his services under Act No. 424, supra, is fixed by Section 17, which is as follows:

"For his services under this Act **during the twenty days prior to each election to which this Act pertains** and for his services on the day of the election, the register, or person acting in his stead, shall be paid the sum of ten dollars ($10) daily. Such payment shall be made from the county treasury, except in the case of a municipal election held at a time different from a primary or general election, in which event payment shall be from the city or town treasury." (Emphasis supplied.)

It is my conclusion that the words, "during the twenty days prior to each election to which this Act pertains," used in Section 17, supra, merely define the period of time during which the register or person acting in his stead is entitled to compensation for his services in reference to any election to which this Act is applicable, and cannot be construed to authorize payment of such compensation for each primary, general, special, and municipal election held on the same day. The words, "and for his services on the day of the election," are significant.

If a municipal election is held on the same day as a primary or general election, there is no provision of the Act which authorizes the county to pay the compensation of the register for his duties in reference to the primary or general election, and for the city to pay such compensation to the register for duties performed in respect to the municipal election. It was not contemplated that the register be paid by the county for performing his duties in respect to general or primary elections held on the same day as a municipal election, and also be paid by the county (or city) for the performance of his duties in respect to the municipal election held on the same day. A city pays the compensation of the person handling absentee ballots in a municipal election only when the municipal election is held at a time different from a primary or general election (Sections 17, 18).

Cf. Biennial Report of Attorney General, 1924-26, page 370, in which it was held that election officials holding a primary election and a special election on the same day are entitled to compensation for only one election. In this opinion, it was stated:

"It is not the legislative intent to compensate for two separate services performed at the same time as indicated by the prohibition of holding two public offices of profit at the same time by the same person. As a matter of fact, officers holding two elections at the same time are performing but one duty, i. e., that of supervising the balloting in two boxes at the same place, alternating their attention between the two."

In view of the above conclusion, it is my opinion that your inquiry must be answered in the negative.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 12, 1950.

Hon. John M. Gallalee,
President,
University of Alabama,
University, Alabama.

Hospitals—Licenses—University of Alabama.

The Student Health Center at Tuscaloosa and the Jefferson-Hillman Hospital at Birmingham, although owned and operated by the University of Alabama, are subject to the regulatory and licensing provisions of Act No. 530, General Acts 1949, page 835.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion bearing date of February 13, 1950, is as follows:

"Re: Act 530 of 1949 Acts of Alabama, page 835

"The State Department of Public Health has drawn to my attention the above Act of the 1949 Legislature requiring payment of a license tax by hospitals and like institutions for the privilege of operating in the state.

"The Board of Trustees of the University of Alabama, an arm of the State Government, operates a student health center on its University Campus for the benefit of University students only, and not for the benefit of the public generally (See Sec. 1 of said Act.).

"The Board of Trustees of the University of Alabama also operates the Jefferson-Hillman Hospital in Birmingham as a teaching hospital for its Four Year Medical College, of which it is a part.

"The University desires to cooperate fully with the State Board of Health and other state agencies in complying with all laws that apply to it, but inasmuch as the University, as a part of the State Government, is exempt from taxation, we are not sure that Act 530 applies to the University.

"We, therefore, respectfully request your opinion as to whether or not the University can legally pay to the state the license fee stipulated in the Act for:

"(a) Operating its Health Center for the benefit of University students on the University campus, and

(b) Operating the Jefferson-Hillman Hospital in Birmingham, as teaching hospital for the Four Year Medical College, of which said Hospital is a part."

I am of the opinion that each of your questions must be answered in the affirmative.

Act No. 530, General Acts 1949, page 835, became effective on January 1, 1950, and has for its purpose the licensing and regulation of hospitals, sanitoria, rest homes, nursing homes, and other related institutions in the State of Alabama. The beneficient effects of such regulation and licensing of institutions for the treatment of injury, deformity, disease or obsterical cases are generally admitted. The act places the licensing and inspection of such hospitals in the State Board of Health. It sets up an Advisory Board of ten members.

Section 2 of Act No. 530, supra, expressly exempts from the provisions of the Act (a) hospitals operated by the Federal Government, and (b) mental hospitals under the supervision of the Board of Trustees of the Alabama State Hospitals.

In deciding your questions, two conflicting propositions are involved. The first is that, where the Legislature has made express exceptions, the legal presumption is that the Legislature did not intend to save other cases from the operation of the statute. **Expressio unis est exclusio alterius.** In such case the inference is strong that no other exceptions were intended. **Birmingham v. Weston,** 233 Ala. 563, 172 So. 643, 109 A. L. R. 970; 50 **American Jurisprudence,** Statutes, Section 434, page 455; 2 **Sutherland on Statutory Construction,** Section 4933, page 471 (3rd Ed.—1943).

The second proposition is that exemption from the operation of general statutes is a State prerogative, and general words in a statute do not apply to the State, nor affect its rights unless a clear intention to the contrary appears. The rule is one of public policy, and in recognition of the attribute of political sovereignty which attaches to government. In the absence of express provision or necessary implication, the State itself remains unaffected. **Downing v. City of Russellville,** 241 Ala. 494, 3 So. 2d 34; **Smith v. McCord,** 203 Ala. 347, 83 So. 71; **Ex parte McOonald,** 76 Ala. 603; **State v. Allen,** 71 Ala. 543; **State ex rel Lott v. Brewer,** 64 Ala. 287; **Miller v. State,** 38 Ala. 600; 3 **Sutherland on Statutory Construction,** Section 6301, page 183 (3rd Ed.—1943); Quarterly Report of Attorney General, Vol. 47, page 142.

In my judgment, the proposition first mentioned, supra, more strongly applies to the facts here involved than does the second. Having made but two express exemptions, the Legislature obviously intended no other exemptions. Had it intended that the Student Health Center and the Jefferson-Hillman Hospital, each owned and operated by the State, not be included under the regulatory provisions of Act No. 530, supra, it would have been a simple matter to have included them in the exemptions, but the Legislature did not do so. Just as it knew that the Alabama State Hospitals are owned and operated by the State of Alabama, the Legislature knew that the Student Health Center and the Jefferson-Hillman Hospital are

owned and operated by the State of Alabama. While the former serves the public in a more limited sense than the latter, each does serve the public.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 13, 1950.

Hon. C. C. Horton, Director,
State Department of Veterans' Affairs,
Montgomery, Alabama.

Veterans—Schools.

The widows and children of honorably discharged World War II veterans, who at the time of death were suffering from World War II service connected disabilities of forty percent, or more, but who died of causes other than their service connected disabilities, are entitled to the educational benefits and opportunities provided in Act No. 633, General Acts 1949, page 972.

Opinion by Assistant Attorney General Johnson.

Dear Sir:

Your request for an official opinion, bearing date of May 18, 1950, is as follows:

"Act Number 633, general session 1949, provides certain State educational benefits to widows and children of servicemen who lost their lives in line of duty in the armed forces between certain dates in World War II, widows and children of those veterans of World War II who die of service-connected disabilities before July 1, 1950, and wives and children of living World War II veterans who are suffering from service-connected disabilities of 40 per cent or more.

"Section 3 of said Act reads as follows:

" 'The wife and children of any veteran who is suffering from a 40% or more service connected disability, brought about from service in the Armed Forces of this country between September 16, 1940 and June 30, 1946, shall be entitled to the following educational advantages and opportunities: The wife shall be entitled to two years attendance upon any institution of higher learning, college or university without the payment of any tuition or fees, and should she elect to take a prescribed course of study in any State trade school, then she shall be required to pay one-half of the regular tuition and fees of such prescribed course of study. The children of such disabled veteran shall be entitled to four years attendance upon any institution of higher learning, college or university of the State without the

payment of any tuition or fees, or he or she shall be entitled to a prescribed course of study in any State trade school, without the payment of any tuition or fees.'

"Will you please give us your opinion as to whether or not we should issue Certificates of Eligibility and Entitlement granting such benefits to widows and children of honorably discharged War II veterans who at the time of death were suffering from War II service-connected disabilities of 40 per cent or more but who died prior to July 1, 1950, of causes **other** than their service connected disabilities."

It is my opinion that your inquiry should be answered in the affirmative.

Clearly, under Section 1 of Act No. 633, General Acts 1949, page 972, any child whose father or mother died from a service connected disability after December 16, 1940, or before July 1, 1950, after being honorably discharged after serving at least ninety days in the Armed Forces between September 16, 1940 and June 30, 1946, is entitled to the benefits provided in Section 1 of said Act.

It is also clear under Section 2 of Act No. 633 that the widow of a deceased veteran of World War II who died from a service connected disability after December 16, 1940, and before July 1, 1950, after being honorably discharged from the Armed Forces after serving at least ninety day between September 16, 1940 and June 30, 1946, is entitled to the benefits provided under said Act.

Section 3 of Act. No. 633 provides that the wife and children of any veteran who is suffering from a forty percent, or more, service connected disability shall be entitled to the benefits provided by said section. There is no limitation provided in Section 3 as to whether such veteran be living or dear, and no limitation as to whetther his death was caused by his service connected disability or by other causes. It will be noted that Sections 1 and 2 limit the benefits to the widow and children of a veteran who died from a service connected disability after September 16, 1940, and before July 1, 1950, and that no ilmitation was written into Section 3 of said Act.

It is true that no mention is made in Section 3 to provide the benefits named therein to the widow and children of a deceased veteran, but the provision is a broad one and applies to **any** veteran who is suffering from a forty percent, or more, service connected disability. I take this to apply to any veteran who was suffering from a forty percent, or more, service connected disability at the time of the effective date of the Act. I cannot perceive that the Legislature intended to make an inequitable and unjust distinction between the wife and children of a living veteran who is suffering from a forty percent, or more, service connected disability and the widow and children of a deceased veteran who at the time of his death was suffering from a forty percent, or more, service connected disability.

The fact that the Legislature restricted Sections 1 and 2 of the Act in question to the widow and children of a veteran who died between December 16, 1940, and before July 1, 1950, from a service connected disability, does not restrict Section 3 to this same application. The only pertinent restriction in Section 3 is that the veteran be suffering from a forty percent, or more, service connected disability and such restriction was not placed in Sections 1 and 2 of the Act, wherein the cause of death must be as a result of the service connected disability in order for the widow and children to be eligible for the benefits.

It is a cardinal rule of statutory construction that a literal interpretation of a statute will not be adopted when it would defeat the purpose of the statute if any other reasonable construction can be given. **Harrington vs. State,** 200 Ala. 480. In determining the meaning of words in a statute, the whole statute must be construed together so as to give a harmonious construction to the whole, if it can be done. **Gordon vs. Cubadist,** 249 U. S. 618.

In my judgment, the conclusions reached herein are in accordance with the intention of the Legislature in enacting the statute under consideration, and the intention of the Legislature in enacting a statute, when correctly ascertained, is the law itself. **City of Birmingham vs. Southern Express Company,** 164 Ala. 529.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

June 16, 1950.

Hon. C. C. Horton, Director,
Department of Veterans' Affairs,
P. O. Box 1509,
Montgomery 2, Alabama.

Insane Persons—Veterans—Commitment.

1. The term "certificate" implies an instrument in writing.

2. Judges of probate may prepare and forward commitment papers upon insane persons to be committed to federal hospitals upon being "informed" by the proper authority of the availability of hospital facilities for such persons, and the "certificate" required by Title 45, Section 210, Code of Alabama 1940, as to the availability of such facilities may be delivered to the accompanying party upon delivery of the insane person to said institution.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of April 4, 1950, is as follows:

"An official opinion is requested as to the correct interpretation of the word 'certificate' as used in Section 210, Title 45, Code of Alabama 1940).

"From reading the above cited section, it will be noted that the Judges of Probate of the various counties in the State of Alabama are vested with the authority to commit insane patients to United States Veterans Administration Hospitals, provided they are entitled to treatment in such hospitals, and with the further proviso that there be a 'certificate from the Veterans Administration' showing that facilities are available and that such persons are eligible for care and treatment therein.

"It quite frequently happens that veterans who are eligible for treatment in Veterans Administration Hospitals are so violently insane with suicidal or homicidal tendencies that it is necessary to restrain them in jails until they can be committed by the Judge of Probate. If the Judge of Probate is required to hold in his hand, before he issues the commitment order, a certificate from the Veterans Administration bearing the signature of the proper official, it would result in many days delay in the average case.

"There are certain Judges of Probate here in the State of Alabama who hold that a statement made by the proper official of the Veterans Administration, over the telephone, that facilities are available for the insane veteran and that he is eligible for care or treatment, is sufficient.

"In order that there may be some uniformity in this matter, I believe that we should have at this time an official opinion from you as to whether the word 'certificate' as used means a certificate in writing, and if so, does the Judge of Probate have to have this certificate in his possession before issuing the order of commitment or may he issue the order of commitment upon the assurance of the official of the Veterans Administration that facilities are available and secure the certificate later?

"Generally, in most of these cases, the hospitalization of an insane veteran in a Veterans Administration Hospital is initiated by a Service Officer of some veterans' organization or by a Veterans Service Officer of the Alabama Department of Veterans' Affairs. When the proper official of the Veterans Administration advises such Service Officer or Veterans Service Officer of the Alabama Department of Veterans' Affairs that a bed is available and such Service Officer

makes that statement to the Judge of Probate, and the Judge of Probate has good reason to believe that the Service Officer is speaking the truth, may he issue the order of commitment without further information from the Veterans Administration?"

In actuality, your inquiry is twofold in nature and requires that I do more than merely interpret the word "certificate" as used within Title 45, Section 210, Code of Alabama 1940. As I understand your inquiry, you desire my opinion as to whether the word "certificate" as used within Section 210, supra, denotes an instrument in writing, and secondly, if it be so held, is it necessary that the judges of probate have such written instrument in hand prior to the issuance of papers committing an insane veteran to a federal hospital.

In answer to the first of such inquiries, I must advise that the word "certificate" does imply a statement in writing. It has been uniformly so held. 6 Words and Phrases (Per. Ed.) 425; 14 C. J. S., Certificate 111. The wisdom of the use of such term or the procedure thereby established is not mine to question, and I must hold that it is required that the judge of probate secure from the proper authority of the federal government a statement in writing as to the eligibility of such veteran for hospitalization, and the availability of hospital facilities for such person.

Turning next to your second inquiry as to whether or not the judge of probate must have such writing in hand prior to the issuance of commitment papers, I would advise that, in my opinion, no such requirement is found within the provisions of Section 210, supra. The pertinent portion of such statute is as follows:

> "* * * * Provided, however, if said patient is entitled to admission to a hospital operated by the United States veterans' administration or other agency of the United States government, the judge of probate, upon receipt of a certificate from the veterans' administration or such other agency showing that facilities are available and such person is eligible for care or treatment therein, may commit such person to said veterans' administration or other agency for care and treatment.* * *"

It is a well known and accepted rule of statutory construction that a statute is to be construed so as to carry out the intent of the Legislature, though such construction may seem contrary to the letter of the statute, and a literal interpretation which would defeat the purpose of a statute will not be adopted, if any other reasonable construction can be given it. Furthermore, the courts, in construing a statute, must look to the context, the spirit and the whole of the statute, as well as other statutes to reach the true intent of the Legislature. **Cole v. Gullatt**, 241 Ala. 669, 4 So. 2d 412; **Long v. Talladega National Bank**, 236 Ala. 366, 182 So. 14; **Broaddus v. Johnson**, 235 Ala. 314, 179, So. 215; **Jefferson County v. Hawkins**, 232 Ala. 398, 168 So. 443.

It is likewise true that courts will, and must, give the language used in statutes a reasonable rather than an unreasonable meaning, and con-

sideration and weight will be given to the practical effect which the proposed construction of such statute will have. **Ervin v. State of Alabama,** 80 Fed. 2d 432; **Birmingham Paper Company v. Curry,** 238 Ala. 138, 190 So. 86; **Mitchell v. McGuire,** 244 Ala. 73, 12 So. 2d 180.

Where the language of a statute is not clear, the legislative intent will be sought from the whole subject, and, in giving effect to legislative intent, courts may look to context of the statute and its provisions and to the history of said statute, conditions which lead to its enactment, material surrounding circumstances, ends to be accomplished, and evils to be avoided or corrected. **Jefferson County Board of Education v. State,** 239 Ala. 276, 194 So. 881. Neither will a literal interpretation be adopted where it would defeat the purpose of the statute, if any other reasonable construction can be given. **Harrington v. State,** 200 Ala. 480, 76 So. 422; **Abramson v. Hard,** 229 Ala. 2, 155 So. 590.

Being remindful, as I must, of all the above, and giving consideration not only to the specific words of Section 210, supra, but also to those other statutes closely related thereto, i.e. Title 45, Sections 207-211, Code of Alabama 1940, I am of the opinion that the system devised and established for the commitment to mental institutions of persons of this State, veteran or otherwise, provides for a due determination of the mental deficiency of the person committed and an ascertainment of the availability of hospital facilities for such person. It is to be noted from the language of Sections 209-210, supra, with respect to State hospitals, that such commitment papers may be issued upon the judge of probate being "informed" by the superintendent of such institution that such person can be received as a patient.

While it is true that, with respect to admissions to federal hospitals, this statute requires that the information as to availability of facilities and the eligibility of such person therefor be by "certificate," I know of no objection to such commitment papers being prepared upon the judge of probate being "informed" by proper authority that facilities are available and such mental patient be thereupon dispatched to such institution. The "certificate" could well be prepared while such person is en route to the institution, and, upon arrival, such "certificate" could be furnished the accompanying party, and the insane person duly committed upon the authority of the commitment papers prepared and forwarded by the judge of probate with the party accompanying the insane person. Such procedure, in my judgment, would be in full conformity with the applicable statutes and would likewise carry into effect in a reasonable manner the spirit and intent of the Legislature in the enactment of such statutes.

To hold otherwise would cause the entire system designed by the Legislature to become hampered by a maze of administrative details, and would, as you suggest, result in an unreasonable delay and confusion in certain instances. The need for immediate hospitalization is sometimes so acute and urgent that same could not be delayed for a matter of several days, and I feel sure that such was not the intention or purpose of the Legislature. In such cases, it is my opinion that the judge of probate may

prepare and forward commitment papers upon being "informed" by the proper authority of the availability of hospital facilities and that such information may be reduced to "certificate" form during the interim, and may be delivered to the accompanying party upon arrival of the patient and such person may thereupon be committed to the institution.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 16, 1950.

Hon. W. Jay Tindle,
County Solicitor,
DeKalb County,
Fort Payne, Alabama.

Fireworks—Sheriffs.

Illegal fireworks seized by sheriff should be destroyed.

Opinion by Assistant Attorney General Straub.

Dear Sir:

Your request for an official opinion bearing date of January 10, 1950, is as follows:

"A man has just plead guilty in DeKalb County Court to possessing fireworks. As you know, the 1949 Legislature passed an act outlawing fireworks and making it a misdemeanor to possess them, etc.

"The Sheriff has the fireworks in his possession. They cost the defendant mentioned about $150.00. I would not give them back to him because they are illegal. I am at a loss to know what to do with these firecrackers since the statute is silent on the matter.

"Please advise what disposition of these fireworks should be made."

Act No. 110, General Acts 1949, page 136, makes it unlawful for anyone to have fireworks in his possession. This act makes no provision for the confiscation or destruction of said fireworks when an arrest is made under the provisions of the act.

It is a general rule that contraband property, the possession of which is illegal, cannot be returned to the accused from whom it was lawfully taken, since that would make him a criminal when he became repossessed of it. 56 C. J. Searches and Seizures, Section 179, page 1250.

It is my opinion that if the fireworks which you mention were returned to the original owner, he would again be guilty of possessing illegal property. To so return the fireworks would defeat the whole purpose of the act, for the possession of the fireworks is the illegal act sought to be prohibited by Act No. 110, supra. Therefore, although no provision was made in said act for the confiscation or destruction of the fireworks, I am of the opinion that they should be destroyed.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 19, 1950.

Hon. G. S. Davis,
Chairman,
Marion County Board of Revenue,
Hamilton, Alabama.

Marion County—Counties—Sales Tax—Use Tax—Attorneys.

The County Board of Revenue of Marion County may not use any of the revenue derived from the sales and use tax levied under the provisions of Act No. 115, General and Local Acts 1949, page 139, during the first twenty-four months after the effective date of said Act, to pay for the service of attorneys employed by the county to defend the constitutionality of said Act.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of May 15, 1940, is as follows:

"Lawson Bonds and E. J. Boyette filed a bill in the Circuit Court in Equity of Marion County, Alabama, against Phillip J. Hamm, as Revenue Commissioner of the State, and against the Marion County Board of Revenue, asking for a declaratory judgment to have declared void Local Act No. 115, found on page 139 of the Acts of the Alabama Legislature for 1949; and to enjoin the further collection of any taxes under said Act.

"The Marion County Board of Revenue employed attorneys to defend this suit and the validity of said Act was sustained by decree of the court rendered on the 20th day of March, 1950.

"The Marion County Board of Revenue desires that you advise us whether we can pay the attorneys employed for their services in this case out of the funds levied and collected under said Local Act

which the complainants sought to have declared unconstitutional and void."

In the case of **Jefferson County v. Henry**, 204 Ala. 381, 86 So. 44, the court held that surplus in a sanitary fund of Jefferson County, created by the levy of a special property tax, cannot legally be diverted by the county and applied to other purposes than that for which the tax was levied, unless such surplus remains after satisfying the indebtedness or demands for which the fund was originally created. The opinion in this case quotes from 15 C. J., Counties, Section 285, as follows:

" 'Where special county funds are authorized, and are in fact raised for a particular purpose, they must be applied thereto and cannot be diverted to any other purpose, or transferred to any other fund, unless a surplus remains after satisfying the indebtedness or the demands for which the fund was originally created; and where a statute directs the disposition of the surplus, or prohibits its disposition in a certain way, such direction or prohibition must be followed in cases in which it is applicable.' "

Cf. **Weaver v. Tidwell**, 228 Ala. 169, 153 So. 218, in which it was held that the per diem of the county commissioners for supervising the maintenance and repair of roads could not be paid out of the county's share of the State gasoline tax, the statute levying the tax specifically providing that the share of the counties "shall be expended exclusively for the maintenance, or construction or repair of roads or highways or bridges in the county."

See also 20 C. J. S., Counties, Section 231, and cases cited in the annotations thereto.

The following statement is found in 20 C. J. S., Counties Section 229.

"The revenues of a county are not the property of the county in the sense in which the revenue of a private person or corporation is regarded. A county being a public corporation existing only for public purposes connected with the administration of a state government, its revenue is subject to the control of the legislature, and when the legislature directs the application of a revenue to a particular purpose, or its payment to any party, a duty is imposed and an obligation created on the county."

Section 7 of Act No. 115, General and Local Acts 1949, page 139 (which Act levies the tax under consideration), is as follows:

"All revenue arising from the taxes herein levied shall be used exclusively and solely for the following purposes: The total revenue arising from the taxes herein levied for the first twenty-four months after the effective date of this Act must be spent by the Marion County Board of Revenue for the construction and equipping of a County Public Clinic in the Town of Guin, in Marion County, Alabama.

Thereafter, the revenue arising from the taxes levied hereunder shall be spent by said Marion County Board of Revenue for the construction, maintenance, operation and improvement of a Nurses' Home at Hamilton, Alabama, for the County Public Hospital located at Hamilton, in Marion County, Alabama; for the maintenance, operation and improvement of the County Public Hospital located at Hamilton, in Marion County, Alabama; for the maintenance, operation and improvement of the County Public Clinic located at Guin, in Marion County, Alabama; and for other public purposes of any kind and description as in the judgment of said Marion County Board of Revenue is meet and proper."

It will be seen from the above section that all revenue arising from the taxes levied by Act No. 115, during the first twenty-four months after the effective date of the Act, must be used exclusively and solely by the Marion County Board of Revenue for constructing and equipping a County Public Clinic in the town of Guin in said county.

It is, therefore, my opinion that the County Board of Revenue of Marion County may not use any of the revenue derived from the sales and use tax levied under the provisions of Act No. 115, supra, during the first twenty-four months after the effective date of said Act, to pay for the services of attorneys employed by the county to defend the constitutionality of said Act.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 19, 1950.

Hon. Grover W. Ray, Mayor,
City of Headland,
Henry County,
Headland, Alabama.

Municipalities—Funds—Parks.

1. Municipalities cannot legally appropriate or donate funds toward the support of a privately owned baseball club.

2. Municipal park and recreation boards cannot appropriate or donate funds which have been allocated by municipalities toward the operation of a privately owned baseball club.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion bearing date of June 7, 1950, is as follows:

"We hope you have already noticed that Headland, Alabama, has a team in the Alabama League along with Dothan, Enterprise, Brewton, etc., and that they are at the moment playing five hundred ball.

"As a community, we are all very much interested in the club, as you might expect, and are having lots of fun as fans following the number one American sport.

"But as you know, these things must be paid for by somebody and, of course, the first source of income is at the gate which for various and sundry reasons so far has failed to meet the expenses necessary to meeting the payrolls of players and other incidentals. A goodly number of local citizens have delved into their pockets for substantial amounts toward maintaining the team. These amounts are proving inadequate and just recently the business management of the Headland Baseball Club has turned on the city treasury of Headland for support.

"Our council and mayor being interested and in sympathy with the baseball club imposed a beer and cigarette tax as a means of raising revenue to support recreation, which included baseball.

"On advice from our city attorney, the council and mayor appointed a Park and Recreation Board, consisting of five of our best local citizens. It is our intention to disburse any funds that we may appropriate from the city treasury to this Board which will in turn handle such a recreation program.

"The above plan leads me to want an official opinion from you on the two following questions, namely: (1) May a municipality legally appropriate or donate funds toward the support of a privately owned baseball club? (2) May a municipal park and recreation board, established according to law, appropriate or donate funds which have been allocated to it by the municipality toward the operation of a privately owned baseball club?

"We will appreciate as early an opinion on these two questions as is convenient for you to render."

The answer to your first inquiry is in the negative, because of Constitution of Alabama 1901, Section 94, which reads as follows:

"The legislature shall not have power to authorize any county, city, town, or other subdivision of this state to lend its credit, or to grant public money or thing of value in aid of, or to any individual, association, or corporation whatsoever, or to become a stockholder in any such corporation, association, or company, by issuing bonds or otherwise."

Your attention is directed to Quarterly Report of Attorney General, Vol. 35, page 84; Quarterly Report of Attorney General, Vol. 39, pages 32 and 65; and Quarterly Report of Attorney General, Vol. 37, page 31.

The answer to your second inquiry is also in the negative, because Sections 511(3-19) of Title 37, Code of Alabama 1940, do not authorize

municipal park and recreation boards to appropriate or donate funds toward the operation of privately owned baseball clubs.

Since the statutes providing for incorporation of park and recreation boards do not purport to delegate this authority of appropriation or donation to the corporations, any such disbursement of municipal funds would be an ultra vires act. For this reason, it is unnecessary to decide here whether park and recreation boards are within the meaning of the words "other subdivision" included in Constitution of Alabama 1901, Section 94.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 20, 1950.

Hon. A. L. Campbell,
Clerk, Circuit Court,
DeKalb County,
Fort Payne, Alabama.

County Courts—DeKalb County—Costs and Fees—Clerks of Circuit Courts.

The clerk of the DeKalb County Court, under Act No. 179, Local Acts 1927, page 93, as amended by Act No. 101, Local Acts 1939, page 59, is entitled to fee for entering judgment as to a defendant in a case in which a nolle prosequi is entered.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion bearing date of April 25, 1950, is as follows:

"I am Clerk of the Circuit Court of DeKalb County and our local bill establishing the DeKalb County Court provides that I shall also act as clerk of that court.

"The Code provides that the Clerk shall receive 25 cents in criminal cases for recording the complaint or indictment. I wish to know whether or not I am entitled to charge as part of the cost the above mentioned fee where the case is nolle prossed. I have heretofore been charging this fee when filing my claim against the Fine and Forfeiture Fund, and this has been the practice ever since the DeKalb County Court was established by local act in 1929."

It is my opinion that the practice you are following is correct. Act No. 179, Local Acts 1927, page 93, as amended by Act No. 101, Local Acts

1939, page 59, which established the DeKalb County Court, provides in Section 4 as follows:

> "That the clerk of the Circuit Court of DeKalb County shall be ex-officio clerk of said court and shall have the powers and discharge the duties which shall devolve upon the clerks of the Circuit Courts and shall be subject to same pains and penalties with regard to the duties of the office, and **shall be entitled to the same fees, as are now, or may hereafter be allowed to Circuit Clerks of Alabama, and the same shall be collected as such fees are collected in the Circuit Courts;** and the deputy Clerk of the Circuit Court of DeKalb County shall be ex-officio deputy Clerk of DeKalb County Court, and exercise the same powers and perform the same duties as are exercised and performed in the Circuit Court." (Emphasis supplied.)

Your attention is directed to Quarterly Report of Attorney General, Vol. 28, page 15, where this office held that a circuit clerk was entitled to a fee for entering judgment as to a defendant in a case in which a nolle prosequi is entered. The considerations which were involved there are applicable here.

Title 11, Section 89, Code of Alabama 1940, was amended by General Acts 1947, page 266, approved October 1, 1947, and provides that clerks of the circuit courts are entitled to fifty cents for entering judgment as to each defendant. However, in view of Constitution of Alabama 1901, Section 281, this increase would be ineffective as to the present incumbent.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 21, 1950.

Hon. John Graves,
State Comptroller,
State Department of Finance,
CAPITOL.

Highways and Highway Department—Counties—Contracts—Road and Bridge Fund.

State Highway Department may contract with counties for the building of roads with funds supplied from the public road bridge fund.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion bearing date of June 5, 1950, is as follows:

"Attached please find Highway Voucher No. 12008 in the amount of $12,584.72, payable to the Board of Revenue of Macon County, which payment is to be charged to the Public Road and Bridge Fund.

"The enclosure also includes a copy of the contract and detailed data of the work performed on this road project, together with correspondence questioning the validity of this type of payment.

"It might appear that a payment of this type may give one county an advantage over other counties by the circumvention of the Farm to Market Act. It is further noted that personnel is employed, by the county, using the Public Road and Bridge Fund which may circumvent the State merit system, and there is the further problem that there may be some violation of Section 54, Title 23.

"Please review this data and the appropriate statutes and advise whether this claim can be paid by this office and have no liability attach."

I am of the opinion that Highway Voucher No. 12008 satisfies the statutory provisions of this State, and that the claim should be paid by the office of the State Comptroller.

You suggest in your letter that the payment of this voucher "may give one county advantage over other counties by the circumvention of the Farm to Market Act." I do not believe that there is any substantiality to this objection. Section 15 of Act No. 329, General Acts 1943, page 311, approved July 1, 1943, states that the provisions of this Farm to Market Act shall be cumulative, and that the act shall not be construed to amend or repeal any existing laws.

Title 23, Section 22, Code of Alabama 1940, reads as follows:

"**Contracts with counties, municipalities, etc.**—The highway department may enter into contracts with any of the counties of the state, or with any of the municipalities of this state as it may with individuals, firms or private corporations, to do any work in the construction, repair or maintenance of the roads, bridges or highways in this state."

Under this last section, it seems certain that the Highway Department can contract with any county for the construction of any road in that county.

You suggest a further objection in that there is a possibility of the Highway Department's circumventing the Merit System in contracts of this nature. Here, the personnel employed are on the county pay roll, and, for this reason, there is no question of evasion of provisions enacted in establishing the State Merit System.

The final problem raised is that there may be some violation of Title 23, Section 54, Code of Alabama 1940. It is my opinion that Section 54,

supra, is not controlling in a situation such as this, where the State contracts with the county for road building.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 21, 1950.

Hon. S. Fleetwood Carnley,
Director of Industrial Relations,
Montgomery, Alabama.

Industrial Relations, Department of—Judges of Probate—Liens—Costs and Fees.

Judges of Probate cannot lawfully charge a fee for indexing and recording, in behalf of the State Department of Industrial Relations, certificates of lien for the collection of unemployment compensation taxes.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion bearing date of June 13, 1950 is as follows:

"I respectfully request your opinion with respect to the following matter:

"The Department of Industrial Relations is charged with the collection of unemployment compensation taxes. As part of its remedy for the collection of said taxes, it is given the right to file liens in the probate courts of this State covering delinquent taxes. Specifically, Section 240, Title 26, 1940 Code of Alabama, as amended 1945, (Gen. Acts, Ala.), provides that,

"The director may file in the office of the judge of probate of any county in this State a certificate which shall show the name of the department for which it is filed, the amount and nature of the contributions, interest, and penalties for which a lien is claimed, together with any cost which may have accrued, the name of the employer against whose property a lien for such contributions, interest, and penalties is claimed, and the date thereof. - - - Such certificate shall be indexed and recorded under the same provision of law of this State relating to the filing and recording of certificates of judgment, and without costs' etc.

"Several probate judges in the State have questioned the right of the Department to file such certificates without paying recording fees therefor.

"I would like your opinion as to whether this Department can legally be charged recording fees by probate judges in this State for the filing of certificates of lien such as are mentioned and described in the quoted portion of the law set out next hereinabove."

I am of the opinion that your inquiry must be answered in the negative.

Title 26, Section 240, Code of Alabama 1940, as amended by Act No. 283, General Acts 1945, page 449, the pertinent part of which you have quoted, expressly provides that the certificate of lien shall be indexed and recorded "without costs."

I am, therefore, of the opinion that this express provision controls, and that the several Judges of Probate in the State have no lawful authority to charge the Department of Industrial Relations a fee for indexing and recording such certificates.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 21, 1950.

Hon. J. Charles Stanley,
Tax Assessor,
Calhoun County,
Anniston, Alabama.

Census—Counties—Calhoun County.

For the purposes of legislation applying to counties having a population of 70,000 or more, the effective date of Calhoun County's population increase from 63,319 to an estimated 79,783 will be the ninetieth day after the first day of the first regular legislative session held next after official publication of the 1950 Federal Decennial Census.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion bearing date of June 13, 1950 is as follows:

"As you recall a bill was passed by the Legislature in 1949 for the benefit of counties having 70,000 or more population. Our county having qualified under this act as evidenced by the enclosed release of official census. I would like to have your opinion as to whether or not we can begin assessing property as of October 1, 1950 under this recent law. If so it will be quite a saving in the administration of my office."

I am of the opinion that your inquiry must be answered in the negative.

Your inquiry apparently refers to Act No. 91, General Acts 1949, page 115, being an act to provide for the assessment of ad valorem taxes on property in counties having a population of not less than 70,000 inhabitants and not more than 300,000 inhabitants according to the last or any succeeding federal census: to provide for the claiming of homestead exemptions and exemptions on personal property in said counties and to provide penalties for failure to comply with the provisions of this act.

Title 1, Section 14, Code of Alabama 1940, provides as follows:

"The ninetieth day after the first day of the first regular legislature session held next after the publication by the federal government of the regular federal decennial population census for Alabama is hereby fixed as the date for any reclassification under any law requiring classification based on such said census."

I judicially know that the regular federal decennial population census, showing the 1950 population of Calhoun County, has not yet officially been released. Attached to your request, you submit a communication dated June 8, 1950 from the Bureau of the Census of the United States Department of Commerce. This communication is a preliminary announcement of the 1950 population of Calhoun County and that of its principal cities. It estimates the 1950 population of the county as 79,783, as compared with the 1940 population of 63,319. The Bureau of the Census states that, while the estimates are believed to be substantially correct, they are subject to revision; and that the official announcement of population will be made at a later date by the Director, Bureau of the Census, Washington 25, D. C.

Therefore, it is my opinion that, insofar as Calhoun County is concerned in the application of Act No. 91, supra, or any other legislation applying to counties having a population of 70,000 or more, the effective date of its population increase from 63,319 (1940 Census) to 79,783 (1950 unofficial Census) will be the ninetieth day after the first day of the next Regular Session of the Legislature, provided the 1950 Federal Decennial Census has been published officially in the meanwhile. See Quarterly Report of the Attorney General, Vol. 20, page 351; Quarterly Report of the Attorney General, Vol. 30, page 86; Quarterly Report of the Attorney General, Vol. 32, page 149.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 23, 1950.

Hon. Roy E. Blair,
Commissioner of Revenue,
State of Alabama,
CAPITOL.

American Red Cross is an agency of the United States; its purchases are exempt from sales tax and use tax.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion, bearing date of May 18, 1950, is as follows:

"The question has arisen under the Alabama Sales Tax Act, Sections 752, et seq., Title 51, Code of Alabama 1940, as amended, and the Use Tax Act, Sections 787, et seq., Title 51, Code of Alabama 1940, as amended, as to whether retail sales of tangible personal property made in this State to the American Red Cross and the storage, use, or consumption of tangible personal property within this State purchased at retail by the American Red Cross, are subject to the provisions of such acts.

"Will you please render me an official opinion on the following questions:

"1. Are retail sales of tangible personal property made by licensed merchants within this State to the American Red Cross taxable under the provisions of the Alabama Sales Tax Act (supra)?

"2. Is the storage, use, or consumption of tangible personal property within this State by the American Red Cross, which property is purchased at retail by the American Red Cross without this State and upon which property no Alabama sales tax has been paid, taxable to the American Red Cross under the provisions of the Alabama Use Tax Act (supra)?"

In your letter of May 18, 1950, you state that the question has arisen under the Alabama Sales Tax Act and the Use Tax Act (Sections 752, et seq., Sections 787, et seq., respectively, of Title 51, Code of Alabama 1940) as to whether retail sales of tangible personal property and the storage, use or consumption of tangible personal property to the American National Red Cross within this State are subject to the provisions of such Acts, and you specifically request an official opinion on the following questions:

1. Are retail sales of tangible personal property made by licensed merchants within this State to the American Red Cross taxable under the provisions of the Alabama Sales Tax Act, supra?

2. Is the storage, use, or consumption of tangible personal property within this State by the American Red Cross, which property is purchased at retail by the American Red Cross without this State and upon which property no Alabama sales tax has been paid, taxable to the American Red Cross under the provisions of the Alabama Use Tax Act, supra?

In reply, I beg to advise that the American National Red Cross is a Federal corporation, first created by Congress in 1905 to implement the International Red Cross Treaty of 1864 (36 USC Ch.1). There were further Acts of incorporation in 1910 (36 Stat. 604) and in 1947 (Act of May 8, 1947, now incorporated in Annual Pocket Part USCA, Title 36, Sections 1 to 13, inclusive). Throughout all these Acts, the purposes of the organization, as prescribed by Congress both during war and peace, are entirely clear. The American Red Cross is clearly a Federal instrumentality authorized under the Treaty Clause and the Welfare Clause of the Federal Constitution. That the activities of such a corporation may not be interfered with by State taxing laws is clear from cases as far back as **M'Culloch v. Maryland, 4 Wheat.** 316, 4 L. Ed. 579, and has been reiterated in Alabama in **Federal Land Bank of New Orleans v. Crossland,** 261 US 374, 67 L. Ed. 703, 29 ALR 1.

The Alabama Sales and Use Tax Acts each specifically exempt from its operation any sales or use "which the State is prohibited from taxing under the Constitution or Laws of the United States of America, Title 51, Code, Sections 755(a) and 789(b)." Where, as in the case of the Red Cross, any tax imposed by the State upon its activities in purchasing and storing tangible personal property must be met out of funds subscribed to the use of a Federal agency which operates under the supervision and audit of the United States Government, the rule that the State tax is not applicable is well established. See **Johnson v. Maryland,** 254 US 51 (1920); **N. Y. ex rel Rogers v. Graves,** 299 US 401; **Mayo v. United States,** 319 US 441; **United States v. Allegheny County,** 322 US 174.

I, therefore, answer both your questions in the negative. It is the opinion of this office that the American Red Cross is an agency of the United States and its purchases are exempt from the sales tax and use tax under the provisions of State and Federal law, hereinabove referred to. This conclusion is in conformity with opinions rendered by the Attorneys General of Tennessee, California and other states, and is also in harmony with decisions rendered by the Bureau of Internal Revenue exempting the Red Cross from various taxes.

All opinions of the Office of the Attorney General in conflict with this opinion are hereby annulled, repealed, and held for naught, including an opinion to Tom C. Garner, Judge of Probate of Jefferson County, bearing date of September 17, 1947.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 30, 1950.

Hon. W. E. Black,
Register,
Tallapoosa County,
Dadeville, Alabama.

Elections—Absentee Ballots—Liquor Referendum.

1. The provisions of Act No. 424, General Acts of 1949, page 601, are applicable to all primary, general, special and municipal elections.

2. The election provided for within Title 29, Section 68, Code of Alabama 1940, whereby a county may change its classification from wet to dry, or vice versa, is a special election.

3. The duties imposed by law upon the Register with respect to the handling of absentee ballots by Act No. 424, supra, are equally applicable to an election of this nature.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of June 24, 1950, is as follows:

"Pursuant to Section 68, Title 29, Code of Alabama, 1940, Hon. C. J. Coley, Judge of Probate of Tallapoosa County, Alabama has ordered an election to be held July 25, 1950, for the people to determine whether or not Alcoholic Beverages can be legally sold in Tallapoosa County, Ala.

"Please advise if legal qualified voters will be permitted to vote an absentee ballot in this election. If so will the Register of Tallapoosa County, Alabama be required to handle said absentee ballots as the same are handled in our Primary and General Elections?"

In my opinion, answer to your inquiry must be in the affirmative.

The casting of absentee ballots by those eligible to do so is now governed in all respects by the provisions of Act No. 424, General Acts 1949, page 601, the provisions of said Act becoming effective upon November 1, 1949. Section 1 of such Act specifically states that the provisions of said Act shall be applicable to all primary, general, special and municipal elections held in the State of Alabama.

In my opinion, the election provided for by Title 29, Section 68, Code of Alabama 1940, whereby a county may change its classification from wet to dry, or vice versa, is a special election within the meaning of Title 17, Section 215, Code of Alabama 1940, and hence the provisions of Act

No. 424, supra, are applicable thereto. It is, therefore, my opinion that those persons duly authorized and qualified under the provisions of Act No. 424, supra, to cast an absentee ballot may cast such a ballot in the election here in question.

In answer to your second inquiry concerning the duties of the Register with respect to the absentee ballots cast in such an election, I point out that it is provided by Title 29, Section 68, supra, that:

> "* * * Said election shall be held and the officers apointed to hold same in the manner provided by law for holding other county elections * * * ."

I, therefore, advise that the duties of the Register with respect to the handling of absentee ballots cast in such election are identical with those duties imposed by law upon the Register in this regard in any other primary, general, special or municipal election. Such duties are to be found set out within Act No. 424, supra.

Opinions of this office holding that absentee ballots may not be cast in special elections are no longer applicable, in view of the provisions of Act No. 424, supra.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 30, 1950

Hon. Kenneth J. Griffith,
Judge of Probate,
Cullman County
Cullman, Alabama.

Judges of Probate—Counties—Funds.

1. If a judge of probate has observed the highest care, vigilance, and diligence in safeguarding money which he has collected for the State or county, has not defaulted as to the time in which he is required to transmit the same to the State or county, and his office is burglarized and the money so collected by him, the property of the State and county, is taken from him by stealth, he and his sureties are not liable for the same.

2. Under the facts stated, the Judge of Probate of Cullman County and his sureties are not liable for money of the State or county which was taken from him by stealth during a burglary of his office on Sunday night, October 30, 1949.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for an official opinion bearing date of May 17, 1950, is as follows:

"On Sunday night, October 30th, 1949, the courthouse was broken into and the probate office was burglarized. The act of burglary being the breaking of the safe in the Probate Office.

"Saturday, October 29th, 1949, was an extremely heavy busy day for this office. My chief clerk, Mr. Allen, went to the bank about 3:10 in the afternoon. The bank was closed for business but they let him in. He made the deposit for Friday and a part of Saturday's business. We kept the Probate Office open on account of the rush until approximately 5:30 Saturday afternoon. We checked up and put all the money taken in in the money sacks together with the checks taken in that day and placed them in the safe and the safe was locked securely, both the enter doors and the outer doors. The employees of the bank could not be reached after we closed and there were no night safety deposit facilities in town. The doors to the Probate Office were securely locked. The writer checked the safe and also his Chief Clerk, H. G. Allen, checked the safe before closing and know that they were securely locked.

"All the windows to the probate office face the main street in the city. At one end of the street is a police sub-station with all night police patrol. Directly across the street is all night taxi-stands with attendants on duty all night. Approximately one-half block on the other end of the street which the windows of the probate office face is the county jail.

"The morning of October 31st, the janitor to the courthouse came in and found the screen to the window in the mens' rest room broken out, the window raised, the side door to the probate office glass broken out, the door opened and the safe opened presumably by tools, the lock having been broken off. The janitor called the sheriff and a deputy, Mrs. R. B. Moyer, came and took charge of the situation and roped the place off, took finger prints of all employees and also looked for finger prints on all likely spots in the office. Therefore, we used the only facilities available by putting the money in the safe furnished by the County for this purpose and which has been in use since the courthouse was built.

"The State Auditors have checked the records to ascertain what business was done on the day before the burglary took place and have called on me as the Probate Judge to make restitution of this money. Therefore, I would like to propound the following questions to you for an opinion:

"1. Would the foregoing facts, ready to be verified, be due diligence on my part in the safekeeping of these funds entrusted to me?

"2. Assuming that the foregoing facts would show due diligence on my part, would I be liable personally to make restitution of this money?"

In **State v. Houston**, 78 Ala. 576, the Supreme Court of Alabama considered the liability of a tax collector and his sureties for money belonging to the State, of which the tax collector was robbed by irresistible force, and held:

"* * * Our conclusion is, that, * * * if, having observed the highest care, vigilance, and diligence to prevent loss, the collector is robbed of money belonging to the State by irresistible force, it constitutes a valid defense to an action on his bond for the recovery of such money. We say **money belonging to the State**, for, if it appears that the specific funds received by the collector have been used or changed for any unauthorized purpose, he becomes **eo instanti** a debtor, and he and his sureties are bound to absolute payment, as for a debt. In such case, subsequent robbery of money substituted for the amount misused, is no defense. The robbery must be of money, the property of the State. * * *"

That case has been frequently cited, quoted from, and commented upon, but the Supreme Court of Alabama has never criticized, modified, or departed from the above holding in anyway. Consequently, it may be said that it is the settled law of this State on this subject.

In light of the above, I think it is also the law of this State that, if, having observed the highest care, vigilance, and diligence to prevent loss, a judge of probate has **money belonging to the State or county** taken from him by stealth, through a burglary of his office, it constitutes a valid defense to an action on his bond for the recovery of such money. The term "money belonging to the State or county" means the specific money which had been collected by the judge of probate for the State or county. This office has previously held to this effect in Biennial Report of Attorney General, 1930-32, page 560, and Quarterly Report of Attorney General, Vol. 6, page 14.

Under the facts and circumstances stated by you in regard to the burglary of your office on Sunday night, October 30, 1949, during which certain money collected by you for the State or county was taken by stealth, it appears that you observed the highest care, vigilence, and diligence in safeguarding such money; and that you were not guilty of any nonfeasance, misfeasance, or malfeasance, which contributed in anyway to the loss of such money.

Accordingly, applying the principle of law above stated to your situation, I hold that you and your sureties are not liable for the money of the State or county which was taken from you by stealth, through a burglary of your office on Sunday night, October 30, 1949.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 30, 1950

Hon. Herman K. Longshore,
Judge of Probate,
Lauderdale County,
Florence, Alabama.

Courts of County Commissioners—Lauderdale County—Compensation.

1. Under the provisions of Act No. 171, Acts 1949, page 198, the members of the Court of County Commissioners of Lauderdale County are to be compensated by payment to them of a fixed sum, not in excess of two hundred fifty dollars monthly, which salary shall be in lieu of all fees, per diem, expenses or other compensation formerly allowed by law to such persons for services performed in and about their duties as commissioners.

2. To furnish said commissioners with a vehicle belonging to the county, together with all gas, oil and repairs incidental to the operation thereof, for use by said commissioners in and about the performance of their duties as such, constitutes an allowance of an additional expense prohibited by Act. No. 171, supra, and is therefore unauthorized.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of March 24, 1950, is as follows:

"As Probate Judge and Ex Officio Chairman of the Court of County Commissioners of Lauderdale County, Alabama, I wish your opinion on the following matter:

"The Legislature of Alabama passed, and on July 1, 1949 the Governor approved the following local act applying only to the Court of County Commissioners of Lauderdale County, Alabama.

" 'Be It Enacted by the Legislature of Alabama:

" 'Section 1. Each member of the Court of County Commissioners of Lauderdale County, Alabama, shall have supervision of and be responsible for the supervision, construction, maintenance and upkeep of all county roads and bridges in the whole county and each of such Commissioners shall make regular monthly inspections of all such roads and bridges at least once in each month..

" 'Section 2. Each member of the Court of County Commissioners of Lauderdale County, Alabama, except the Probate Judge, shall make and file with the Probate Judge a monthly written report showing the roads and bridges inspected by him during the month, together with the condition of such roads and bridges and his recommendations concerning each such road or bridge so inspected.

" 'Section 3. The Court of County Commissioners, or a majority thereof, shall approve the appointment and rate of pay of every person employed by the County in the construction, maintenance and, upkeep of roads and bridges.

" 'Section 4. The Probate Judge shall assist the County Commissioners in their duties as fixed hereunder, to such extent as may be necessary but the compensation of the Probate Judge shall remain as now fixed by law.

" 'Section 5. Regular terms of the Court of County Commissioners of Lauderdale County, Alabama, shall be held on the first and third Mondays in each month of each year, and special terms may be held at any time as now provided by law.

" 'Section 6. Each County Commissioner shall receive a monthly salary of not exceeding TWO HUNDRED FIFTY DOLLARS each month, to be fixed from time to time by the Court of County Commissioners, which salary shall be in lieu of all fees, per diem, expenses or other compensation now allowed by law to such Commissioner for services rendered in and about his duties as such Commissioner. The payment of all such salaries shall be made out of the County Treasury by warrant drawn by the Probate Judge on the first of each calendar month for the preceding month, provided, however, the Probate Judge shall in no case draw such a salary warrant in favor of and County Commissioner until such Commissioner shall first file with the Probate Judge the written report required under section 2 of this Act.

" 'Section 7. All laws or parts of laws in conflict herewith are hereby repealed.'

"Shortly after the approval of said act, the Commissioners Court authorized the purchase of four pickup trucks which were paid for by the Road Department of Lauderdale County and thereupon each Commissioner took over one truck for use in his official duties and particularly in the exercise of the extra duties required of him by said act, the County Road Department furnishing all gas, oil and repairs.

"The question has been raised, does the use of said trucks (including the furnishing of gas, oil and repairs by the County Road Department) constitute compensation in addition to the $250.00 a month salary provided by Section 6 of said act, which salary is declared to be in lieu of all fees, per diem, expenses, or other other compensation now allowed by law to such Commissioners for services rendered in and about his duties as such Commissioner. Up to the time of the passage of said act the compensation of the Commissioners was fixed by the general laws.

"The Commissioners have suspended the use of said trucks pending the receipt of your opinion. Therefore, it is important to get as prompt opinion from your office as may reasonably be possible."

In my judgment, the question presented by your request must be answered in the affirmative.

I have examined the provisions of Act No. 171, Acts 1949, page 198, quoted at length in your request, and I find Section 6 thereof to be pertinent to your inquiry. This particular Section provides as follows:

"Section 6. Each County Commissioner shall receive a monthly salary of not exceeding TWO HUNDRED FIFTY DOLLARS each month, to be fixed from time to time by the Court of County Commissioners, which salary shall be in lieu of all fees, per diem, expenses or other compensation now allowed by law to such Commissioner for services rendered in and about his duties as such Commissioner. The payment of all such salaries shall be made out of the County Treasury by warrant drawn by the Probate Judge on the first of each calendar month for the preceding month, provided, however, the Probate Judge shall in no case draw such a salary warrant in favor of any County Commissioner until such Commissioner shall first file with the Probate Judge the written report required under Section 2 of this Act."

Prior to the adoption of the above Act, the compensation, including salary, per diem and expenses of the commissioners of Lauderdale County, was governed by the provisions of Title 12, Section 28, Code of Alabama 1940, as amended. This statute provided that such commissioners should receive as their compensation the amount of four dollars per day while engaged in the performance of their duties as such, both in at-

tendance upon the Commissioners Court and in connection with their duties with regard to the roads of the county, and also five cents per mile necessarily travelled by them in and about the performance of such duties.

In my opinion, it is clearly obvious from a reading of Act No. 171, supra, and particularly Section 6 thereof, that it was the purpose and intent of the Legislature to provide that such commissioners now be paid a fixed amount, not in excess of two hundred fifty dollars per month, for the performance of the duties imposed by such Act, such sum to be in lieu of all fees, per diem, expenses or other compensation previously allowed under the provisions of Title 12, Section 28, supra.

In my judgment, the form of additional remuneration mentioned by you in your request, that is the furnishing of a county vehicle, together with all gasoline, oil and repairs, for the use of such commissioners in and about the performance of their duties as such, is an additional expense prohibited by the term of Section 6, Act No. 171, supra.

As noted, under the terms of Title 12, Section 28, supra, said commissioners formerly received a reimbursement of five cents per mile for each mile traveled by them in the performance of their duties. Certainly it could not be argued that such mileage reimbursement would be due if the travel was performed in county vehicles with all expenses incidentals thereto, i.e. gas, oil and repairs, being furnished by the county. Under the new system of compensation established by Act 171, supra, the commissioners are now compensated by payment to them of a fixed sum, to be paid them in lieu of all former fees, per diem, expenses or other compensation, which would of necessity include the mileage reimbursement formerly received by said commissioners. In my opinion, to furnish to said commissioners a vehicle, with all necessary gasoline, oil and repairs incidentals to the operation thereof, for use in the performance of their duties as such, is tantamount to a continuation of the mileage allowance provided for under the old system of compensation.

The provisions of Act No. 171, supra, being to the effect that the compensation provided for therein shall be in lieu of all fees, per diem, expenses or other compensation, now allowed by law, I must hold that the furnishing of said vehicles by the county, together with the gasoline, oil and repairs thereof, constitutes the allowance of an expense prohibited by Act No. 171, supra, therefore, unauthorized.

Former opinions of this office supporting the conclusion herein reached are to be found in Quarterly Report of Attorney General, Volume 1, page 304; uarterly Report of Attorney General, Volume 9, page 152 and Quarterly Report of Attorney General, Volume 11, page 113.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

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